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The Rhetoric of Torts: How Advocates Help Jurors Think about Causation, Reasonableness, and Responsibility

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* Associate Professor, Quinnipiac College School of Law. The idea for this project germinated in the 1991-1992 New York University Law School Lawyering Theory Colloquium, over which Tony Amsterdam, Jerome Bruner, and Peggy Davis presided; I thank them for their inspiration. Many practitioners and academics—including Dominick Esposito, Richard Lipman, Greg Loken, Linda Meyer, Phil Meyer, Elyn Saks, Sheila Taub, and John Thomas—aided me by offering data, insights, and criticisms of earlier drafts. Steve Errante, Sandy Meiklejohn, and Richard Sherwin were especially generous with their help. Reference librarians Tina DeLucia and Larry Raftery helped me retrieve much of the psychology literature on which I rely. Errors, of course, are mine alone.

Introduction

What does "negligence" mean? The formal answer, derived from appellate opinions and collected in hornbooks, provides certain contours. These include the overall structure for approaching the negligence decision: a rule-element analysis consisting of duty, breach, causation, and injury.[1] Appellate law also establishes guidelines for

1. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30, at 164-65 (5th ed. 1984). A complete formal legal analysis of the negligence case, of course, would also include affirmative defenses such as contributory negligence and assumption of risk, as well as rules governing burdens of proof.

determining specific elements of the rule, such as the cost-benefit definition of "reasonable" behavior.[2]

In the majority of negligence cases that are tried, however, the jury's verdict decides liability. And in these cases, negligence and its component concepts of causation and reasonableness would seem to have a less determinate meaning.[3] Within the very broad range de-

2. This is the Learned Hand test, generally attributed to his decision in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947); *see* KEETON ET AL., *supra* note 1, § 31, at 173 & n.46. For the cost-benefit analysis of negligence law and tort law in general, *see* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 147-97 (3d ed. 1986). Research in cognitive psychology indicates that lay attributions of responsibility for accidents may track the Learned Hand calculus. Marylie Karlovac & John Darley, *Attribution of Responsibility for Accidents: A Negligence Law Analogy*, 6 SOC. COGNITION 287, 296-98, 301-07, 313 (1988). These findings may be consistent with at least some of the other phenomena reported in this Article; for instance, the prototypes of reasonable behavior that attorneys offer to jurors (*see infra* notes 91-94 and accompanying text) may very well include the weighing of the costs and benefits of possible courses of action. But note that in the research of Karlovac and Darley, subjects (unlike actual jurors) were not provided information about the outcome of the target person's behavior, and thus were not susceptible to the "hindsight bias," discussed *infra* note 193; *see also infra* note 259 (discussing research of Karlovac & Darley in terms of severity effect).

3. Reasonableness, causation, and responsibility may very well have explicable substantive meanings if negligence law is considered as a body of rules. For instance, instrumentalists of the law and economics school insist that negligence law serves (or ought to serve) the social goal of overall accident cost reduction, and therefore, that reasonableness and other concepts ought to be understood in light of this goal. *See* POSNER, *supra* note 2. Other goals posited for negligence law (descriptively and prescriptively) include fairness, deterrence, compensation, and loss distribution. *See, e.g.*, Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 607-08 (1992). Another view is that reasonableness has a more or less determinable meaning that depends on the whole of the law, including our collective decisions about who should be burdened by accident costs and norms located elsewhere in the law. *See* GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 69 (1985). Negligence law may be "reckonable" to practitioners' satisfaction even if it is conceived of, not as a body of rules, but as decisions by appellate judges constrained by tradition and craft. *See* KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 19-61 (1960) (discussing fourteen "steadying factors" that make appellate law broadly predictable).

It is, however, difficult to see how reasonableness, causation, and responsibility, as decided by juries, could possibly have the determinate, consistent meanings that instrumentalists and holists posit. The jury's distinctive function is generally said to be that it brings its sense of equity to the case. *See, e.g.*, MOLLY SELVIN & LARRY PICUS, THE DEBATE OVER JURY PERFORMANCE: OBSERVATIONS FROM A RECENT ASBESTOS CASE 60-61 (1987) (observing, without passing judgment, that "[j]uries may deviate from but not entirely disregard the judge's instructions" in order to give substantive or individual justice in the individual case, a kind of modified nullification); Harry Kalven, Jr., *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1065-66, 1070-72 (1964). Marc Galanter, in *The Regulatory Function of the Civil Jury*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 88-90 (Robert E. Litan ed., 1993), explains that the value of the jury is its injection of substantive community morality, via nonprofessional, discontinuous decision-makers, into what would otherwise be a routinized system in which professionals bargain to resolve disputes, without regard to substantive values. For other functions of the jury, *see, e.g.*, George Priest, *Justify-*

fined by appellate law, a (reasonable) jury can decide either way,[4] and generally need not give reasons for its decision.[5] Both the jury's decision-making latitude[6] and the insulation of its rationales from public scrutiny[7] arguably serve worthwhile purposes. But both obscure the meaning of negligence law in action.

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ing the Civil Jury, in VERDICT, *supra,* at 103 (listing three major purposes of civil juries as bringing community standards to cases involving difficult or complex value judgments, protecting citizens from state power, and educating citizens in civic duties) (citing Kalven, Calabresi & Bobbitt, and de Tocqueville); Michael Saks, *Blaming the Jury,* 75 GEO. L.J. 693, 702-04 (1986) (reviewing VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY (1986)) [hereinafter Saks, *Blaming*] (among the "latent" functions of the jury are to keep the law comprehensible to laypeople and to fine-tune legislation to individual cases to prevent government overreaching). In the negligence case, the jury's function has been described, a la Kalven, as the application of dominant social expectations and practices to the particular controversy, rather than the implementation of "Scientific Policymaking" such as cost-benefit analysis. Michael Wells, *Scientific Policymaking and the Torts Revolution: The Revenge of the Ordinary Observer,* 26 GA. L. REV. 725, 732-33 (1992).

It is unclear how any goal such as deterrence, accident cost reduction, or compensation, however defined, could rationally be furthered by such a wide-open and unarticulated process as decision-making by nonprofessional, discontinuous bodies that need not give the public reasons for their decisions. *See id.* at 731-37; Kenneth S. Abraham, *What is a Tort Claim? An Interpretation of Contemporary Tort Reform,* 51 MD. L. REV. 172, 175 (1992) (submitting negligence cases to juries means that "at least in principle every negligence case is unique, for the law makes no effort to treat it as a member of a general category governed by a legal rule"; however, modern tort law has been modified by the inclusion of some features of nontort compensation systems). Likewise, with respect to Calabresi's "holist" understanding of negligence law, cited above, it seems problematic to infer the existence and relative weight of the norms that law supposedly reflects from a process designed, in part, to conceal what the norms are and how they are weighted. *See* CALABRESI, *supra,* at 88. In all of these respects—the jury's lack of professional expertise, its lack of a tradition of craft, and its lack of public accountability, as well as its lack of any need to project its decisions onto future disputes—the law juries make would not appear to be "reckonable" in the way the law of appellate judges is. *Cf.* LLEWELLYN, *supra,* at 19-61 (appellate law more predictable).

4. *See, e.g.,* KEETON ET AL., *supra* note 1, § 33, at 193 ("The application of [the] standard of reasonable conduct is as wide as all human behavior."); *id.* § 38, at 235-38 (discussing the jury's role in determining breach of duty).

5. Special verdicts or interrogatories accompanying the usual general verdict provide occasional, partial exceptions to the rule. They tell us how the jury decided each essential element of the law, including the allocation of comparative fault when relevant; they tell us, *e.g.,* whether the jury found a party negligent, but not necessarily the jury's reasons for finding that party negligent. *See, e.g.,* FED. R. CIV. P. 49 (special verdicts and interrogatories); CONNECTICUT PRACTICE BOOK § 312 (1994) (jury interrogatories).

6. *See* KEETON ET AL., *supra* note 1, § 33; for a classic justification of jury discretion in these "intermediate" cases, *see Railroad Co. v. Stout,* 84 U.S. (17 Wall) 657, 664 (1873).

7. Some argue that the jury's insulation from rule-application and public justification is good because it allows jurors to reach compromises between abstract and concrete, case-specific notions of fairness, or between the various conceptions of fairness held by different jurors. *See* Steven D. Smith, *Rhetoric and Rationality in the Law of Negligence,* 69 MINN. L. REV. 277, 301 (1984); Catharine Pierce Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication,* 88 MICH. L. REV. 2348, 2390-95, 2402-08 (1990). It is

Most judges seem to believe that jurors understand and apply the law of negligence well, and leading commentators concur that juries decide competently.[8] Yet studies have repeatedly shown that jurors do

unclear how these scholars can know, under the circumstances, whether or how the notion of reasonableness provides a "common vocabulary" for the jurors' task, *see* Smith, *supra* at 296-99, or that the decision reached is a "correct" one, since it would appear that within the contours of appellate law, anything goes. Perhaps the most that can be said about the system's refusal to subject jury determinations to the scrutiny of public reason, and ultimately to a regime of rules, is that "the [jury's] equity is too subtle to be codified." Harry Kalven, Jr., *The Jury, the Law, and the Personal Injury Damage Award,* 19 OHIO ST. L.J. 158, 168 (1958).

GUIDO CALABRESI AND PHILIP BOBBITT, TRAGIC CHOICES 57-58 (1978), argue that the opacity of juries' determinations of responsibility for accidents helps us as a society to avoid confronting openly the "tragic choice" between life (or the reduction of the risk of death and serious injury) and alternative allocations of scarce resources which the negligence case forces upon us. *See infra* note 195 (discussion of cognitive schema of responsibility for accidents in terms of Calabresi and Bobbitt's analysis); *see also* Saks, *Blaming,* supra note 3, at 702-04 (giving important decisions to different, anonymous juries diffuses responsibility for controversial choices on which public consensus is lacking).

George Priest, however, argues on the basis of empirical research that most cases decided by civil juries do not concern the sorts of complex or conflicting social values to which Calabresi and Bobbitt and Saks refer. Priest also shows that most cases decided by civil juries do not involve the assertion of government power against individuals, and that very few citizens serve on juries. *See* Priest, *supra* note 3, at 117-24. He concludes that "[t]here are no grounds that justify exempting the jury from giving reasons for its decision." *Id.* at 125.

8. For judges' views of how well jurors understand the law, *see, e.g.,* Valerie P. Hans, *Attitudes Toward the Civil Jury: A Crisis of Confidence?, in* VERDICT, *supra* note 3, at 261-63 (reporting a 1987 Louis Harris poll indicating that only 24% of federal and 31% of state judges believe that jurors fail to apply the law because they don't understand it); R. Perry Sentell, Jr., *The Georgia Jury and Negligence: The View From the Bench,* 26 GA. L. REV. 85, 113, 117, 138 (1991) [hereinafter Sentell, *Bench*] (89% of responding state court judges believe jurors follow instructions and 94% believe jurors "generally experience[ ] no difficulty in understanding the negligence case"). It is possible that judges have a personal stake in professing a high opinion of juror competence; such a view would tend to reflect that the judges themselves are doing a satisfactory job of instructing jurors on the law.

For scholarly agreement about juror competence, *see, e.g.,* VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY 245-51 (1986) ("Jurors take their responsibilities seriously, and the prime determinant of verdicts is the weight of evidence . . . . [The jury system] serves the cause of justice very well."); REID HASTIE ET AL., INSIDE THE JURY 230-31 (1983) (contrasting juries' competent fact-finding with their problems in understanding and applying law); Joe S. Cecil et al., *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials,* 40 AM. U. L. REV. 727, 744-45 & n.106-11 (1991) (quoting representative views from recent scholarship); Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empiricism,* 77 CORNELL L. REV. 1124, 1152-53 & nn.68-72 (1992) (citing literature on jury competence); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?,* 140 U. PA. L. REV. 1147, 1236-39 (1992) [hereinafter Saks, *Do We Really Know?*] (examining the high degree of judge-jury agreement and research correlating evidence and jury decisions, and concluding that "juries are one of our society's most reliable decision-making institutions").

A leading indication that juries often decide "correctly" is the relatively high rate of agreement between judges and juries. *See, e.g.,* HARRY KALVEN, JR. & HANS ZEISEL, THE

not comprehend much of the law they are supposed to apply.[9] How

AMERICAN JURY 63 (1966) (judge agrees with civil jury 78% of the time); Hans, *supra,* at 263 (reporting a 1987 *National Law Journal* poll of state and federal judges, indicating that more than three-quarters said they disagreed with no more than 10% of civil jury verdicts); Sentell, *Bench,* at 99, finding that 87% of Georgia state judges believed that they agreed with jury's decisions at least as often as the figure reported by Kalven and Zeisel). This agreement rate of about 80% compares very favorably with the rates of agreement among independent decision-makers in other professions, *e.g.* physicians, especially when we consider that the easiest 80-95% of cases have already been removed by settlement or by injured people's decisions not to sue. Saks, *Do We Really Know?, supra,* at 1236 & n.316 (citing research of Shari Seidman Diamond).

Attorneys' views of juror competence are more mixed. *Compare* R. Perry Sentell, Jr., *The Georgia Jury and Negligence: The View From the Trenches,* 28 GA. L. REV. 1, 27-42 (1993) (80% of plaintiffs' lawyers and 71% of defendants' lawyers believe jurors follow instructions; 86% and 79%, respectively, believe jurors understand the case in general) *with* Hans, *supra,* at 265-67 (noting the lack of comprehensive studies, but citing a Federal Judicial Center report indicating that 72% of attorneys think that a judge would be more likely than a jury to apply the law correctly and that about a third of attorneys think a jury would understand their argument as well as a judge would and be as likely to decide fairly). *See also* Clermont & Eisenberg, *supra,* at 1149-52 (suggesting that judges, lawyers, and policy makers tend to think, incorrectly, that jurors are not competent).

Perhaps unsurprisingly, more than 80% of jurors in two surveys said that they understood the law well, although in one survey some 45% believed that their fellow jurors did not. Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors, in* Verdict, *supra* note 3, at 295; *cf. infra* note 92 (most people think they are more intelligent and fair-minded than the average person).

9. The ability of jurors to comprehend and apply instructions on negligence law or anything else is problematic at best. One study of actual jurors indicates that the jurors understood fewer than half of the instructions given, and that they did not understand the substantive criminal law better than uninstructed members of the same jury pool. Alan Reifman et al., *Real Jurors' Understanding of the Law in Real Cases,* 16 LAW & HUM. BEHAV. 539, 539-45, 547, 553 (1992); *see also* AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE § 1-3, at 12 (1982) (reporting several studies finding that jurors understood less than half of instructions); Elizabeth C. Wiggins & Steven J. Breckler, *Special Verdicts as Guides to Jury Decision Making,* 14 LAW & PSYCHOL. REV. 1, 32 (1990) (finding juror comprehension of instructions "fairly poor" using both special and general verdict forms).

Considerable research using mock jurors indicates a rather complex and imperfect relationship between instructions and juror judgment, with some indication that clarifying the language of instructions, giving instructions before as well as after trial, and putting instructions in writing may lead jurors to understand and apply the law more accurately. *See, e.g.,* Shari Seidman Diamond & Jonathan D. Casper, *Blindfolding the Jury to Verdict Consequences: Damages, Experts, and the Civil Jury,* 26 LAW & SOC'Y REV. 513, 557-58 (1992) (observing that mock jurors were more likely to properly follow instruction not to let an automatic trebling rule in antitrust cases affect the size of damages they award when the justification for this automatic trebling rule was included in instruction); Amiram Elwork et al., *Juridic Decisions: In Ignorance of the Law or in Light of It?,* 1 LAW & HUM. BEHAV. 163, 163, 165-76 (1977) (rewriting instructions in more comprehensible language did not improve jurors' ability to apply the appropriate legal criteria to the facts when jurors were already familiar with criteria through personal experience, but did improve jurors' ability to understand unfamiliar legal rules); Vicki Smith, *Prototypes in the Courtroom: Lay Representations of Legal Concepts,* 61 J. PERSONALITY & SOC. PSYCHOL. 857,

can we account for this discrepancy? What is a juror's conception of negligence if it is not exactly negligence doctrine, yet something that satisfies most participants in and observers of the legal system as doing the work that the doctrine is supposed to do?[10]

Much research has been conducted into how juries make law. "[W]e know more about jury decision-making than about any other

858 (1991) [hereinafter Smith, *Prototypes*] (reviewing literature indicating that "jurors' understanding of the law is quite poor," but that clarifying the language of instructions or giving instructions before as well as after trial increases juror comprehension somewhat).

Post-verdict interviews with some actual jurors also indicate reasoning and decisions strikingly variant from the instructions. Consider, for instance, the account of the 1981 *Washington Post* libel trial, in which William Tavoulareas won a $2.05 million verdict largely because the foreman stubbornly clung to and convinced his fellow jurors of a wholly incorrect notion of libel law as it applied to public figures. *See* Steven Brill, *Inside the Jury Room at the Washington Post Libel Trial,* AM. LAW., Nov. 1982, at 1, 89-94. This led the trial judge in a later important defamation case to require separate, seriatim verdicts on the issues of defamatory meaning, falsity, and actual malice. *See* Abraham Sofaer, *Jury Management in Sharon v. Time, Inc.,* 8 U. BRIDGEPORT L. REV. 445, 445-49 (1987). *See also* LITIGATION SECTION, A.B.A. SPECIAL COMM. ON JURY COMPREHENSION, JURY COMPREHENSION IN COMPLEX CASES 43-52 (1989) [hereinafter A.B.A. SPECIAL COMM.] (cataloguing jury confusion about instructions for complex cases); Selvin & Picus, *supra* note 3, at 52-54 (reviewing the *Washington Post* and other cases in which juries deviated significantly from the instructions). For evidence to the contrary from posttrial juror interviews, *see, e.g.,* Valerie P. Hans & William S. Lofquist, *Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate,* 26 LAW & SOC'Y REV. 85, 104-06, 110-11 (1992) (jurors in tort cases against businesses report deciding in accordance with the law even when their feelings dictated the contrary or when they disapproved of the law, though authors suspect that jurors dealt with discomfort by reducing awards). For criticisms of reliance on the essentially anecdotal information of a few high-profile cases as a basis for inferences about jury behavior generally, *see* SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 208 (1988); *cf.* Robert M. Hayden, *The Cultural Logic of a Political Crisis: Common Sense, Hegemony and the Great American Liability Insurance Famine of 1986,* 11 STUD. L., POL. & SOC'Y 95, 104-08 (1991) (unmasking the "argument by anecdote," in the form of popular reports of supposedly outrageous jury awards, which insurers used to blame the legal system for sharp increases in liability insurance); Saks, *Do We Really Know?, supra* note 8, at 1158-62 (criticizing reliance on anecdotal information for inferences about tort liability system).

The somewhat critical evidence of juror comprehension of the law should be placed in a broader context of jury competence, especially with regard to fact-finding and responsible deliberation. *See* sources cited *supra* note 8.

10. The discrepancy probably cannot be fully accounted for by differences between the criteria used by the social scientists and the practitioners to evaluate juror understanding of the law, although the vagueness of the latter prevents precise comparison. A social scientist typically measures (mock) juror comprehension of the law by administering a questionnaire setting forth brief hypotheticals and asking respondents whether each represents a true or false statement of the law. *See* Reifman et al., *supra* note 9, at 544-45. By contrast, judges and attorneys may simply be asked whether they think jurors understand the law or not. *See,* Sentell, *Bench,* supra note 8.

aspect of the legal process."[11] Our necessarily indirect[12] knowledge comes from several sources, including posttrial interviews with actual jurors, studies of "shadow" or surrogate jurors, mock jury experiments, jury verdict research, field experiments, and combinations of these. All provide valuable, but limited, information.[13]

11. Saks, *Do We Really Know?,* supra note 8, at 1235. It should be noted that much more is known about criminal than civil juries. ROBERT J. MACCOUN, GETTING INSIDE THE BLACK BOX: TOWARD A BETTER UNDERSTANDING OF CIVIL JURY BEHAVIOR [hereinafter MACCOUN, GETTING INSIDE] 18 (1987).

12. An exceptional direct report of jury deliberations is *Frontline: Inside the Jury Room* (PBS television broadcast, Apr. 8, 1986) [hereinafter *Frontline*]. The first research program of the University of Chicago Jury Project, in 1954, included tape recordings of deliberations in civil trials; federal and most state legislatures responded by prohibiting further observation of or eavesdropping on juries. KASSIN & WRIGHTSMAN, *supra* note 9, at 13-14. Actual deliberations in the *Frontline* case and a second case are analyzed in John F. Manzo, *You Wouldn't Take a Seven-Year-Old and Ask Him All These Questions: Jurors' Use of Practical Reasoning in Supporting Their Arguments,* 19 LAW & SOC. INQUIRY 639, 642-62 (1994).

13. For brief surveys of methods of jury research, *see* KASSIN & WRIGHTSMAN, *supra* note 9, at 12-19; MACCOUN, GETTING INSIDE, supra note 11, at 5-17; Robert J. MacCoun, *Inside the Black Box: What Empirical Research Tells Us About Decisionmaking by Civil Juries, in* VERDICT, *supra* note 3, at 140-47. For an extensive bibliography, *see* WALTER F. ABBOTT ET AL., JURY RESEARCH: A REVIEW AND BIBLIOGRAPHY (1993). A summary of the strengths and limitations of these methods with respect to the topic of this Article follows.

INTERVIEWS WITH ACTUAL JURORS. Both popular and scholarly works on jury decision-making have utilized interviews with jurors. For examples of scholarly work relevant to this Article that is based on juror interviews, *see, e.g.,* SELVIN & PICUS, *supra* note 3; Hans & Lofquist, *supra* note 9.

Cognitive psychological research indicates that juror interviews may be very limited as a source of accurate information about how the jurors decided. *See* Richard Nisbett & Timothy DeCamp Wilson, *Telling More Than We Can Know: Verbal Reports on Mental Processes,* 84 PSYCHOL. REV. 231 (1977) (reviewing research and concluding that people generally lack direct introspective access to their higher-order cognitive processes; when they attempt to report on those processes, they base their reports instead on a priori implicit causal theories); *see generally* RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 205-23 (1980) (reporting Nisbett's and others' research on people's imperfect ability to attribute the causes of their own behavior and discussing criticisms of that research). In particular, jurors may be motivated to respond to researchers' questions in ways that the jurors think will put them in a favorable light. Hans & Lofquist, *supra* note 9, at 107-08 (acknowledging and briefly responding to the relevant literature).

"SHADOW" OR SURROGATE JURORS. In this method, people with demographic characteristics similar to those of the actual jurors observe a trial; researchers may interview them as the trial proceeds, record their deliberations, or both. *See, e.g.,* WALTER F. ABBOTT, SURROGATE JURIES 1-21 (1990) (overview of methods and research findings); MACCOUN, GETTING INSIDE, *supra* note 11, at 9-10; Donald E. Vinson, *The Shadow Jury: An Experiment in Litigation Science,* 68 A.B.A. J. 1242 (1982) (describing author's use of shadow jury to assist I.B.M. in its defense of antitrust litigation); Hans Zeisel & Shari Seidman Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court,* 30 STAN. L. REV. 491, 508-10, 518-31 (1978) (testing effectiveness of

attorneys' use of peremptories by retaining excused jurors as shadow jurors; finding significant effects in five of twelve trials studied). Shadow jury studies have the advantages of using an actual trial as the stimulus material and, by comparison with postverdict interviews with actual jurors, of not relying exclusively on jurors' after-the-fact analyses. The major shortcomings include the expense of having shadow jurors sit for what may be a lengthy trial and the fact (as in mock jury studies) that shadow jurors are aware that their decisions do not affect actual litigants. *See* MACCOUN, GETTING INSIDE, *supra* note 11, at 10.

MOCK JURY RESEARCH. This is probably the most extensively used scholarly method for learning about how juries decide. *See* MACCOUN, GETTING INSIDE, *supra* note 11, at 12-14. The literature is vast. The great advantage of the mock jury method is that it allows researchers to manipulate any aspect of the presentation of the case or the conditions of deliberations in order to measure the effect of discrete variables on subjects' decisions. The major limitations of mock jury research concern its external validity: experimental design often varies significantly from actual trial conditions; experimental subjects are typically undergraduates enrolled in psychology courses at one of the researchers' institutions, a substantially different population than that of most actual jury pools; and subjects know they are deciding a simulation, not a real case, and therefore that their decision will not affect real parties. For an important discussion of the methods of mock trial and other jury research, *see* ROBERT M. BRAY & NORBERT L. KERR, *Methodological Considerations in the Study of the Psychology of the Courtroom, in* THE PSYCHOLOGY OF THE COURTROOM 287-323 (Norbert L. Kerr & Robert M. Bray eds., 1982).

JURY VERDICT RESEARCH. The statistical analysis of jury verdicts compares the characteristics of actual cases—type of litigants, claims, etc.—with outcomes, searching for correlations over a large number of cases. Important statistical analyses of verdicts that are relevant to this Article include AUDREY CHIN & MARK A. PETERSON, DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS (1985) (studying more than 9,000 civil trials) and James K. Hammitt et al., *Tort Standards and Jury Decisions,* 14 J. LEGAL STUD. 751, 753-58 (1985) (finding certain systematic biases in damage awards). *See generally* MACCOUN, GETTING INSIDE, *supra* note 11, at 7-8 (noting pioneering work in the "archival approach" to studying juries). The major limitations of this valuable method of jury research are that studies usually do not include all relevant variables that might affect jury decision-making, and that the results, which are in the form of statistical correlations, may tell us much about the outcomes of jury deliberations but not about why juries decide as they do. *See id.* at 8.

FIELD EXPERIMENTS. In two studies, researchers have experimentally manipulated the conduct of actual trials to isolate and test the effects of individual aspects of the process, such as pre-instructing jurors on the law or permitting jurors to take notes. Larry Heuer & Steven D. Penrod, *Instructing Jurors: A Field Experiment with Written and Preliminary Instructions,* 13 LAW & HUM. BEHAV. 409, 410-28 (1989); Larry Heuer & Steven Penrod, *Increasing Jurors' Participation in Trials: A Field Experiment with Jury Notetaking and Question Asking,* 12 LAW & HUM. BEHAV. 231, 232-36 (1988). Limitations of this research method include the difficulty of obtaining court permission to conduct the experiments and the ethical problems of varying trial conditions among otherwise similarly situated litigants. *See* MACCOUN, GETTING INSIDE, *supra* note 11, at 10-11.

COMBINATION OF METHODS. Certainly the most famous of jury studies based on a combination of methods is KALVEN & ZEISEL, *supra* note 8, at 33-117 (study of more than 8,000 criminal and civil trials based on analysis of outcomes and questionnaires sent to judges, revealing extent of and reasons for divergences between judge and jury). For recent extensive studies employing observation of alternate jury deliberations, posttrial interviews of jurors, attorneys, and judges, and written juror questionnaires, *see* A.B.A. SPECIAL COMM., *supra* note 9 (analysis of juror performance in six complex cases); Valerie P. Hans,

This Article attempts to add to our knowledge of what negligence means to jurors by studying how advocates try to persuade jurors to reason about accident cases. From the words lawyers use in their closing arguments, we can make at least qualified inferences about jurors' "common sense" of negligence: how their cognitive frameworks, their habits of judgment, and the contexts in which they decide affect the way they process the judge's instructions. We can ask what must be true about jurors' thinking in order for what the lawyers say to make sense.[14] Thus, by inquiring directly about trial advocacy, this Article indirectly examines the psychology of juror decision-making.

Robin Hood Myth Challenged, NAT'L L.J., June 6, 1994, at C1, C6-C8 (reporting some results of research project including public opinion polls, mock jury experiments, and interviews with jurors in trials involving corporations).

PROFESSIONAL AND POPULAR KNOWLEDGE. Other sources of information about how jurors think include the professional wisdom of practicing attorneys, as well as legal and popular media reports of jury trials. *See generally* Galanter, *supra* note 3, at 72-80 (how participants in the legal system learn about jury behavior). (Note that some of this information is based on posttrial interviews with actual jurors and is subject to the limitations inherent in that source; *see id.*) It has been observed that a good number of attorneys and others who think they know how jurors think are probably mistaken. *See id.* at 83-86 (tracing sources of misinformation about jury behavior); Clermont & Eisenberg, *supra* note 8, at 1149-55 & nn.62, 68-82 (citing widespread professional misperception of juries as incompetent and biased toward plaintiffs and summarizing empirical research to the contrary); Saks, *Blaming,* supra note 3, at 693.

14. The project thus follows efforts in many fields, including linguistics, anthropology, and the philosophy of language, to identify the implicit frameworks that speakers and listeners must share in order to understand each other. One classic work in the philosophy of language is PAUL GRICE, *Logic and Conversation,* in STUDIES IN THE WAY OF WORDS 22 (1989). Grice explains that in ordinary conversation, people often mean something other than what they literally say. "Implicature" of this sort occurs when a speaker blatantly violates maxims governing ordinary conversation (*e.g.,* to be relevant), while apparently continuing to observe the "Cooperative Principle," the listener's assumption that the conversation is a cooperative effort to further the particular purposes of the conversation. When this happens, the listener must figure out how to reconcile the speaker's violation (*e.g.,* an ostensibly irrelevant remark) with the speaker's presumed continued observance of the Cooperative Principle, and in order to do so supplies the additional meaning the speaker has left implicit. *Id.* at 22-31. Grice's analysis of conversation and meaning has generated a large scholarly literature. *See Pragmatics* (Steven Davis ed., 1991) (readings on Gricean analysis); *see also* sources cited *infra* note 142 (application of Gricean analysis to causal attribution).

Recent work in linguistics also seeks to articulate the cognitive frameworks implicit in our ordinary discursive practices—how we categorize things and people and how we use metaphor in ordinary conversation and explanation—and thus to identify what participants in the culture assume in order for what they say and do to make sense to themselves and to each other. *See, e.g.,* CULTURAL MODELS IN LANGUAGE AND THOUGHT (Dorothy Holland & Naomi Quinn eds., 1987) [hereinafter CULTURAL MODELS]; GEORGE LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND (1987); EVE E. SWEETSER, FROM ETYMOLOGY TO PRAGMATICS: METAPHORICAL AND CULTURAL ASPECTS OF SEMANTIC STRUCTURE (1990). Similarly, modern legal anthropology has iden-

Research in social and cognitive psychology and linguistics indicates that jurors are likely to reason about an accident case as they would about questions of categorization and judgment in ordinary life: by using various knowledge structures and judgmental habits or heuristics.[15] This Article describes the structures and heuristics that

tified different styles of discourse that ordinary people use to argue their cases in small claims court and the implicit conceptions of justice that correspond to each. JOHN M. CONLEY & WILLIAM M. O'BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE 1-57 (1990). This Article may be thought of as an extension of this ethnography to the discourse of lawyers to ordinary people in court.

These studies in the philosophy of language and linguistics indicate that we may infer from what attorneys say, assuming that they are making sense to the jurors, the implicit frameworks that the attorneys and jurors share. It does not indicate whether and how the jurors act upon their understandings of attorneys' speech. For all we know, jurors in the cases studied understand perfectly well the implicit arguments, and then decide on entirely different grounds. *See infra* note 20 (problems in inferring juror thought from attorney speech). This Article, therefore, assumes, without attempting to prove, that there is a connection between how the attorneys implicitly try to persuade jurors and how the jurors in fact think through the case. Proof of the connection must await further, controlled experimentation.

Note also that the present research does not distinguish between *juror* and *jury* thinking. I speak throughout of *juror* thinking, because the data are limited to what the attorneys say; a linguistic analysis of *jury* thinking would have to include what jurors say to each other during deliberations. The direct study of deliberations would thus seem to be required to test hypotheses about jury, as opposed to juror, decision-making. *See, e.g.*, Garold Stasser et al., *The Social Psychology of Jury Deliberations: Structure, Process, and Product, in* THE PSYCHOLOGY OF THE COURTROOM, *supra* note 13, at 221 (reviewing research that focuses on the jury's collective decision-making process); MACCOUN, GETTING INSIDE, supra note 11, at 30-32 (reviewing studies of juror cognition and commenting that the research programs need to be extended to the study of mock jury deliberations). Knowledge about how jurors think is worthwhile if the criterion of worth is effect on trial outcomes. Research indicates generally that most juries decide in favor of the initial majority, as determined by informal polling at the beginning of deliberations. *See* HANS & VIDMAR, *supra* note 8, at 110 & n.23, 112; Sarah Tanford & Steven Penrod, *Jury Deliberations: Discussion Content and Influence Processes in Jury Decision Making*, 16 J. APPLIED SOC. PSYCHOL. 322, 323, 342 (1986); Christy Visher, *Juror Decision Making: The Importance of Evidence*, 11 LAW & HUM. BEHAV. 1, 2 (1987).

15. To the extent that the purposes and contexts for deciding causation, fault, and responsibility in ordinary life differ from those that shape the jurors' task in deciding accident cases, results from psychological research may not generalize unproblematically to the courtroom. *See* Sally Lloyd-Bostock, *The Ordinary Man and the Psychology of Attributing Causes and Responsibility*, 42 MOD. L. REV. 143 (1979) [hereinafter Lloyd-Bostock, *The Ordinary Man*] (summarizing relevant attribution research and discussing differences between attributions in legal and nonlegal contexts). The same author, however, notes the close relationship between legal and nonlegal attributions of causation and responsibility. *Id.* at 168. Elsewhere she discusses the complementary use of tort standards to guide social cognition inquiries and invites legal scholars to engage in the type of analysis illustrated in this Article. *See* Sally Lloyd-Bostock, *Attributions of Cause and Responsibility as Social Phenomena, in* ATTRIBUTION THEORY AND RESEARCH: CONCEPTUAL, DEVELOPMENTAL AND SOCIAL DIMENSIONS 261, 267 (Joseph Jaspars et al. eds., 1983) [hereinafter Lloyd-Bostock, *Attributions*]. For examples of social psychologists who have used legal criteria for

seem most relevant to juror judgments about responsibility for accidents,[16] and explains how the attorneys' rhetoric reflects jurors' use of these habits of thought.[17]

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assigning responsibility as a guide to the formulation of psychological criteria for the attribution of responsibility in ordinary life, *see* KELLY G. SHAVER, THE ATTRIBUTION OF BLAME: CASUALTY, RESPONSIBILITY AND BLAMEWORTHINESS 64-70 (1985) (constructing a psychological definition of responsibility based on leading legal notions of responsibility from Hart and Holmes); Frank D. Fincham & Joseph M. Jaspars, *Attribution of Responsibility: From Man the Scientist to Man as Lawyer, in* 13 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 81, 96-106 (L. Berkowitz ed., 1980) (explaining relevance of Hart and Honore's definition of legal causal responsibility for psychological theory of attribution of responsibility).

Social scientists have urged that the results of cognitive psychological research be tested in the context of juror decision-making. *See* MACCOUN, GETTING INSIDE, supra note 11, at vi, 29-31. The legal literature includes several applications of knowledge structures and judgmental heuristics to juror decision-making. *See, e.g.,* J. ALEXANDER TANFORD, THE TRIAL PROCESS: LAW, TACTICS AND ETHICS 14-15 (2d ed. 1993) [hereinafter TANFORD, TRIAL PROCESS] (briefly summarizing cognitive heuristics and biases of juror decision-making); Victor Gold, *Covert Advocacy: Reflections on the Use of Psychological Persuasion Techniques in the Courtroom,* 65 N.C. L. REV. 481 (1987) (arguing that lawyers' use of psychological principles to persuade jurors threatens to undermine proper deliberative processes); Edward Green, *The Reasonable Man: Legal Fiction or Psychosocial Reality?,* 2 LAW & SOC'Y REV. 241, 242-45 (1967) (early empirical effort to ascertain lay understanding of "reasonableness" using simple, written case simulation and questionnaire); James A. Holstein, *Jurors' Interpretations and Jury Decision Making,* 9 LAW & HUM. BEHAV. 83 (1985) (focusing on jury deliberations and the schemas jurors articulate to convince other jurors of their interpretations of the case); Albert J. Moore, *Trial By Schema: Cognitive Filters in the Courtroom,* 37 UCLA L. REV. 273 (1989) (illustrating how jurors use cognitive schemas and heuristics to decide questions of fact); Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial By Heuristics,* 15 LAW & SOC'Y REV. 123, 126-45, 156 (1980) (discussing how factfinders at trial process quantitative information using intuitive heuristics); J. Alexander Tanford & Sarah Tanford, *Better Trials Through Science: A Defense of Psychologist-Lawyer Collaboration,* 66 N.C. L. REV. 741 (1988) (responding to Gold, *supra,* and arguing that criticisms of use of psychology in the courtroom are based on incorrect assumptions about psychology, the legal process, and the relationships between the two); Richard L. Wiener, *Social Analytic Jurisprudence and Tort Law: Social Cognition Goes to Court,* 37 ST. LOUIS U. L.J. 503 (1993) [hereinafter Wiener, *Social Analytic Jurisprudence*] (applying social cognition theory to negligence and reporting experiments on effects of counterfactual thinking on attributions of fault and responsibility); Stephen W. Mysliwiec, Note, *Toward Principles of Jury Equity,* 83 YALE L.J. 1023 (1974) (applying "equity theory" and attribution theory to suggest five principles that constitute jurors' sense of equity; primarily concerned with criminal law).

16. As the title of the Article indicates, I focus on how jurors assess responsibility for accidents, and how they think about the components of responsibility, fault, and causation. I do not address, except incidentally, the fascinating and arguably related topic of how jurors think about damages.

17. In examining the cognitive significance of attorneys' speech, this Article engages in discourse analysis. For a brief summary of the principles of discourse analysis, *see* Margaret Wetherell & Jonathan Potter, *Discourse Analysis and the Identification of Interpretative Repertoires, in* ANALYZING EVERYDAY EXPLANATION: A CASEBOOK OF METHODS 168 (Charles Antaki ed., 1988).

The rhetoric of torts indicates that, to a considerable extent, jurors try to achieve justice by comparing what happened to something else. Advocates seem to presume that jurors compare the parties' conduct to prototypes of how reasonable people behave, and that jurors contrast what happened to counterfactual scenarios in which the accident did not occur in order to decide whether some act or omission by one or both of the parties caused the accident. Doing justice by comparing the specific facts of the case and general models of behavior to one another is what has been described as pragmatic or practical reasoning.[18] This Article explores the particular forms that jurors' pragmatism may take—how lawyers persuade jurors to reconcile specific notions of fairness or justice with the law of negligence in individual cases.[19]

Jurors' uses of everyday cognitive tools often produce decisions that conform to the textbook law of negligence. This is not surprising, because that law regulates everyday life and is administered by human beings. But sometimes jurors' reliance on these cognitive tools leads to judgments that depart from what the law dictates; even when the use of these tools is consistent with the law, examining them shows how jurors are likely to fill in the very wide gaps that elements of the law like "reasonableness" leave open. By analyzing only the lawyers' arguments, I cannot prove the extent to which jurors think the way lawyers argue.[20] But the lawyers' rhetoric does suggest how jurors'

18. *See, e.g.*, M. Wells, *supra* note 3. Jury decision-making in negligence cases is pragmatic not only in its dialectic of concrete and general, but also in other respects: in its practical, purposeful context—jurors assess responsibility in order to award (or decline to award) damages—and in its inclusion of community values and practices. For the Aristotelian sources of what we would today call pragmatic reasoning about ethics, *see* MARTHA C. NUSSBAUM, THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY 249-63 (1986). On pragmatism and legal reasoning, *see* Symposium, *On the Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990).

19. A close study of lawyers' rhetoric indicates that jurors' pragmatism is not, as some have claimed, simply a concealed negotiation of conflicting visions of fairness. *Cf.* Smith, *supra* note 7, at 301 (discussing jury's latitude of discretion as a central function in achieving corrective justice goals); C. Wells, *supra* note 7, at 2390-92 (suggesting that a jury is the ideal institution for bridging the gaps between the formal concept of "reasonableness" and the defendant's actual conduct).

20. Support for the very general point that jurors use both "common knowledge" and legal rules to decide cases, based on a microlinguistic analysis of actual jury deliberations, is provided by Manzo, *supra* note 12, at 657 (studying transcripts of deliberations in one criminal and one civil case, author observes that "jurors have two sources of experience from which to obtain support for their views: from their everyday lives, and from the rules, evidence, and legal lexicon they obtain from the trial and the deliberation").

The presumption that what attorneys say is strongly and specifically connected to how jurors think is problematic. *See* Anthony G. Amsterdam & Randy Hertz, *An Analysis of*

Closing Arguments to a Jury, 37 N.Y.L. SCH. L. REV. 55, 111 & nn.143-44 (1992) (suggesting the need for more empirical study of the impact of differing stories in closing arguments upon jurors' thinking). First, attorneys' rhetoric may suggest knowledge structures and judgmental heuristics that jurors do not employ. Rhetoric is multidimensional and multivalent, and one rhetorical device may indicate various, even conflicting, patterns of thought. Moreover, plaintiffs' attorneys may increase jurors' ability to resist persuasion by forewarning them of defense attorneys' anticipated arguments. *See* Daniel Linz & Steven Penrod, *Increasing Attorney Persuasiveness in the Courtroom,* 8 LAW & PSYCHOL. REV. 1, 17-26 (1984). It is therefore possible that an advocate may reduce the impact of the opponent's rhetorical implications of knowledge structures and judgmental heuristics by pointing them out to the jurors. There is not yet any research specifically on this point, although Vicki Smith has shown that instructions that explicitly address jurors' prior prototypes of crimes improve jurors' ability to identify as crimes those events that meet the legal definition but not the prototype. *See* Vicki L. Smith, *When Prior Knowledge and Law Collide,* 17 LAW & HUM. BEHAV. 507 (1993) [hereinafter Smith, *Prior Knowledge*]. Note, however, that implicit strategies may be more difficult to locate and forewarn jurors about. For an illustration of forewarning in a negligence case, *see Roe, infra* note 161, at R. 38.25-41.9, 71.5-17 (plaintiff's attorney's attempt to counter what he characterizes as the "blame the victim" contributory negligence argument).

Second, jurors may think in ways not prompted or encouraged by the attorneys' arguments. *Cf.* Brill, *supra* note 9, at 89-94 (jurors in *Washington Post* libel trial swayed by one juror's incorrect understanding of the law); *Frontline, supra* note 12 (jurors in *Frontline* trial argued legally irrelevant issues). Mock jurors have also been shown to schematize the same, relatively simple scenario in a great variety of ways. *See* Holstein, *supra* note 15, at 90 (15 schemas observed during 48 mock deliberations). This research suggests that however many schemas the advocates' arguments imply, jurors are likely to be ready with more. And without a comprehensive examination of deliberation transcripts and accurate postverdict polling, it may not be possible to know which of the schemas implied by the closing arguments matched or triggered the most common or important or deeply held schemas of the jurors. The attorneys, limited by the nature of the case or their own knowledge and imagination, may argue in language that fails to trigger important juror knowledge structures and inferential heuristics. And if there is reason for caution when drawing inferences to juror thinking from jurors' own speech during mock deliberations, *see* Holstein, *supra* note 15, at 85, 89, considerably more caution would appear appropriate in the effort to infer what jurors think from what attorneys say to them.

Yet it seems reasonable to presume that the ways in which attorneys try to persuade jurors are strongly related to the ways jurors think. James Holstein, for instance, observes on the basis of mock jury deliberation research that attorneys and witnesses attempt to structure information in ways that will appear coherent to the jury. *Id.* at 90. This presumes that the juror schemas those attorneys and witnesses try to address are shared, social constructs, not purely idiosyncratic ideas of the jurors. Without directly observing actual deliberations, we cannot test this, as we can when a judge writes an opinion incorporating portions of counsel's brief. But it would surely be odd if there were no significant connections—if the speech acts of trained professionals, highly motivated to make just those connections and reputed for their success in making them, were instead irrelevant to the speakers' goals. And there is evidence that the lawyers whose arguments are studied in this Article are experienced, successful advocates. Reputations for success in persuading juries are often based largely on anecdotal evidence, so more objective, albeit more indirect, evidence of the attorneys' competence may be helpful. Of the eight attorneys represented in the closing arguments examined in this Article, 4 MARTINDALE-HUBBELL LAW DIRECTORY (1992 ed.) provides some relevant professional data concerning six. At the time of their respective trials, their average length of practice was 26 years; five of the six were

cognitive tools may combine with doctrine to create a common sense of negligence.

I. Rhetoric and Cognition in Accident Cases

A. Overview: How an Attorney Argues

The data this Article studies are transcripts of closing arguments in several accident cases.[21] For the sake of clarity, I will focus on one

members of one or both of the American Trial Lawyers Association and the Connecticut Trial Lawyers Association; two (plaintiffs' attorneys in *Butler, infra* note 22, and *Roe*) were or had been leading members of those organizations; and one was an adjunct professor of trial practice.

This Article, therefore, follows in the long tradition of rhetorical analysis which presumes that what advocates say may reflect and guide, if not determine, what their audiences think. *See, e.g.*, THOMAS M. CONLEY, RHETORIC IN THE EUROPEAN TRADITION 4-7 (1990) (teaching of rhetoric flourished in Greece beginning in 5th century B.C. partly to help citizens argue their cases in newly created popular courts); *see also* EDWARD P.J. CORBETT, CLASSICAL RHETORIC FOR THE MODERN STUDENT 136 (3d ed. 1990).

21. The research is based on four Connecticut negligence cases, two tried in federal court and two in state court. Each was argued to a jury on a negligence theory, and transcripts of the complete trial, including closing arguments and instructions, were available for each. Three of the transcripts were provided in response to the author's solicitation of local attorneys; the fourth had been used as an exercise in a torts course and was already in the author's possession.

Transcripts of closing arguments might appear to provide a limited database for an analysis of trial advocacy and juror cognition. It is, therefore, appropriate to discuss and place in perspective some of the possible limitations of this research.

TRANSCRIPTS OF CLOSING ARGUMENTS AS DATA. The analysis of transcripts alone appears to miss much of what goes on in a jury trial. First, the analysis omits much about the context of the cases, including details about the parties, attorneys, jurors, and judges involved. Second, to examine only the words the attorneys use, and in transcript form at that, is to leave out intonation, accent, pace of speech, and other features of spoken and unspoken communication. Third, by studying only closing arguments, the analysis omits all the other phases of the case in which attorneys try to persuade jurors, such as voir dire, opening statements, and witness examination.

Nevertheless, transcripts of closing arguments provide much valuable information about trial advocacy and hence about the rhetoric of negligence in particular cases. First, the failure to consider the demographic characteristics of the jurors or the parties does not undermine the project. Most research has failed to show any strong correlation between jurors' demographic characteristics or general attitudes and their decisions. To be sure, some studies (as well as the jury selection firms that have flourished in the last fifteen years) have claimed that jurors' demographic characteristics, such as race, class, age, and occupation, and their relevant attitudinal biases (*e.g.*, authoritarian versus egalitarian), significantly affect their decisions. *See, e.g.*, Brian H. Bornstein & Michelle Rajki, *Extra-Legal Factors and Product Liability: The Influence of Mock Jurors' Demographic Characteristics and Intuitions about the Cause of an Injury*, 12 BEHAV. SCI. & L. 127, 130-31, 143-44 (1994) (surveying research on effect of juror characteristics on decisions and reporting experiment showing some effect of jurors' race and socioeconomic status on verdicts). The expert consensus, however, is that jurors' personal characteristics are not controlling in most cases. *See* Phoebe C. Ellsworth, *Some Steps Between Attitudes and Verdicts, in* INSIDE THE JUROR

42 (Reid Hastie ed., 1993) ("Most research that has attempted to predict verdict preferences on the basis of stable juror characteristics, such as attitudes and personality traits, has found that individual differences among jurors . . . account[ ] for only a small proportion of the variance in verdict choices."); HANS & VIDMAR, *supra* note 8, at 89-92 (questioning effectiveness of "scientific jury selection"); MACCOUN, GETTING INSIDE, supra note 11, at 19 & nn.19-20, and sources cited; Martin F. Kaplan, *Cognitive Processes in the Individual Juror, in* THE PSYCHOLOGY OF THE COURTROOM, *supra* note 13, at 204-06 (mock trial research shows personal bias significant only in cases where evidence relatively unreliable); Visher, *supra* note 14, at 3 ("research suggests that jurors' personal characteristics are substantively insignificant in affecting trial outcomes"). Moreover, while there is some evidence indicating that characteristics of the parties may bias juror decision-making, *see generally* Francis C. Dane & Lawrence S. Wrightsman, *Effects of Defendants' and Victims' Characteristics on Jurors' Verdicts, in* THE PSYCHOLOGY OF THE COURTROOM, *supra* note 13, at 84-88 (reviewing relevant research); *see also* CHIN & PETERSON, *supra* note 13, at v-x (effects of litigant characteristics on outcome, including liability and verdict, based on analysis of more than 9,000 civil jury trials; concluding, among other things, that black litigants and deep pocket defendants received less favorable outcomes), the research consensus is that jurors are not ordinarily swayed by racial prejudice or by emotion. *See* TANFORD, TRIAL PROCESS, *supra* note 15, at 14 & n.8. Professor Visher also notes that much of the research on the impact of parties' characteristics may be flawed because of experimental design. In some, subjects were presented with descriptions of only one of the parties (in a real trial, jurors would have access to both, of course). In others, researchers' manipulations of the information (in order to isolate variables) diverged from the way in which actual jurors use that information. In most, insufficient attention was paid to the state of the evidence in the case. Visher, *supra* note 14, at 3-5; *accord* Tanford & Tanford, *supra* note 15, at 755-56 & n.92.

Second, it is true that features of spoken communication other than content are important to ethnographers and discourse analysts. *See* RESPONSIBILITY AND EVIDENCE IN ORAL DISCOURSE 1-22 (Jane H. Hill & Judith T. Irvine eds., 1993); *cf.* John M. Conley et al., *The Power of Language: Presentational Style in the Courtroom,* 1978 DUKE L.J. 1375 (whose subjects evaluated oral, not written, speech); Janet Sigal et al., *The Effect of Presentation Style and Sex of Lawyer on Jury Decision-Making Behavior,* 22 PSYCHOL. 13, 17 (1985) (strongly encouraging use of videotape rather than transcripts in simulated jury research). Moreover, non-verbal features of the lawyer's presentation (*e.g.,* posture, position in the courtroom, and physical appearance), as well as other elements of the performance (*e.g.,* the use of visual aids, the spectators, and the courtroom itself), may very well be important to persuasion. *See, e.g.,* Conley et al., *supra,* at 1379-86 (discussing effects of "powerful" versus "powerless" speech); Sigal et al., *supra,* at 16-17 (use by defense counsel in mock criminal trial of "passive" presentation style—low amount of eye contact, hesitations, slowness of speech, and "general lack of assertiveness"—correlated with low acquittal rate; no correlation between attorney's sex and conviction rate, regardless of presentation style); Donald Vinson, *Juries: Perception and the Decision-Making Process,* 18 TRIAL 52, 54-55 (Mar. 1982) (suggesting that presentational factors such as pace of speech, visual aids, etc. important in gaining and holding jurors' attention). Psychological research has associated persuasiveness with, for instance, the speaker's credibility, attractiveness, and power. *See* Linz & Penrod, *supra* note 20, at 29-45 & nn.98-156. The greater the credibility of the communicator, the less counterarguing the listener will do, hence the more uncritically the message will be accepted. Attractiveness obviously cannot be gleaned from a transcript, and some of the determinants of perceived credibility, such as perceived expertise and trustworthiness, as well as such overt behaviors as pace of speech, usually cannot be either. On the other hand, the more involving an issue, the less important the credibility of the source; involved listeners will generate counterarguments, *see* Linz &

Penrod, *supra* note 20, at 21, 23 (citing research of Richard Petty and John Cacioppo). *Cf.* Martin Fishbein & Icek Ajzen, *Acceptance, Yielding and Impact: Cognitive Processes in Persuasion, in* COGNITIVE RESPONSES IN PERSUASION 339-59 (Richard E. Petty et al. eds., 1981) (demonstrating how message content is the most important factor in persuasion; few reliable findings correlate factors such as message source (*i.e.,* credibility) or receiver (*i.e.,* self-esteem) with persuasiveness).

The words lawyers use, however, remain significant. Research indicates that "high-involvement" listeners tend to focus on the quality of the argument rather than on noncontent stimuli (*see* John A. Bargh, *Automatic and Conscious Processing of Social Information, in* 3 HANDBOOK OF SOCIAL COGNITION 31-33 (Robert S. Wyer, Jr. & Thomas K. Srull eds., 1984); *see also* Linz & Penrod, *supra* note 20, at 20-22 (citing research showing that interested listeners will process a message more diligently)), although it is unclear whether jurors should be considered high-involvement listeners. *See infra* note 291 (noting ambiguity of definition of "high-involvement" for purposes of applying literature on active cognition to jurors). Furthermore, in many cases the persuasive effect of nonverbal factors may be roughly balanced between the two sides; in other cases, a factor favoring one side may be cancelled out by a different factor favoring the other. Thus, the verbal content of the arguments is likely to remain important.

Third, closing arguments are an essential component of advocacy. Research indicates, to be sure, that first impressions often have a lasting effect, reducing the incremental effect of the summation. *See* Linz & Penrod, *supra* note 20, at 10-16 (discussing limits and qualifications of "primacy effect," with special application to the courtroom); *see also* Thomas A. Pyszczynski & Lawrence S. Wrightsman, *The Effects of Opening Statements on Mock Jurors' Verdicts in a Simulated Criminal Trial,* 11 J. APPLIED SOC. PSYCHOL. 301 (1981) (finding that mock jurors are heavily influenced by first strong persuasive statement: a lengthy prosecution opening coupled with a brief defense opening tended to yield guilty verdict, while brief prosecution opening coupled with lengthy defense opening tended to yield not-guilty verdict); H.P. Weld & E.R. Danzig, *A Study of the Way in Which a Verdict is Reached by a Jury,* 53 AM. J. PSYCHOL. 518 (1940) (approximately one-quarter of jurors in mock trial reached definite decision early in the trial; for most jurors, degree of certainty oscillated throughout trial according to testimony and lawyers opening and closing statements).

But the closing argument is when the attorney brings the entire case together for the jurors, in light of the evidence actually presented rather than that which she expected to be presented. *See* RICHARD D. RIEKE & RANDALL K. STUTMAN, COMMUNICATION IN LEGAL ADVOCACY 202 (1989) (importance of closing argument); TANFORD, TRIAL PROCESS, *supra* note 15, at 369-70 (same); Valerie P. Hans & Krista Sweigart, *Jurors' Views of Civil Lawyers: Implications for Courtroom Communication,* 68 IND. L.J. 1297, 1315-17 (1993) (observing that both openings and closings are important because they create frameworks for jurors to understand the case); *see also* sources cited in BETTYRUTH WALTER, THE JURY SUMMATION AS SPEECH GENRE 7-8, 38 (1988) (76% of trial attorney respondents thought that summation was "extremely important" in trial process; remaining 24% considered it important); *but see* HERBERT J. STERN, TRYING CASES TO WIN 129-32 (1991) (opening arguments more important than closing arguments); E. Allan Lind & Gina Y. Ke, *Opening and Closing Statements, in* THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE, at 232-33 (Saul Kassin and Lawrence Wrightsman eds., 1985) (suggesting that disproportionate attention has been paid to closing statements at expense of opening statements). Closings represent ways of conceiving of the case that the attorneys believe the jurors may accept. It does not matter whether summations change jurors' minds about the outcome; they would provide insight into how jurors evaluate the negligence case even if they simply confirm the views many or all of the jurors already hold at the close of the evidence. To be sure, actual jurors surveyed tend to say that closing arguments play little role in their decisions. *See, e.g.,* A.B.A. SPECIAL COMM., *supra* note 9, at 54 (8% of jurors

surveyed in four complex cases believed that closing arguments changed their minds about the outcome); Hans & Sweigart, *supra,* at 1314 (80% of jurors asked said that closing arguments did not draw them to one side or the other). These jurors may have responded as they did, however, in order to conform to the judges' admonitions that their decisions were to be based on the evidence and the law and not on the arguments, *see* WALTER, *supra,* at 205-08; or, more generally, the jurors may simply not have been aware of the effect of the closing arguments on their thinking. *Cf.* Nisbett & Wilson, *supra* note 13 (reviewing evidence that people cannot reliably report on their higher-order cognitive processes).

The present research, moreover, has been guided by a practical concern. In Connecticut federal district courts, as a matter of practice rather than local rule, attorneys are usually not permitted to make opening arguments; therefore, only closing arguments are available.

SAMPLE SIZE. The present research is largely qualitative, not quantitative. I have not examined enough transcripts to offer generalizations about, say, the average rate at which attorneys use rhetorical questions in closing arguments. *See infra* notes 294-313 and accompanying text (quantitative analysis of microlinguistic events in closing arguments). But interpretive validity itself is valuable. Discourse analysis (like much of history, anthropology, and other sciences of unique human events) depends largely on interpretation. *See* Wetherell & Potter, *supra* note 17, at 161 ("For discourse analysts the success of a study is not in the least dependent on sample size" because a small sample may generate a large number of interesting and important linguistic patterns); *cf.* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 29 (1984) (in lexicographic practice, a word may be added to a new edition of the dictionary on the basis of a handful of confirmed uses; "[t]here is no magic number of citations that guarantees entry."). The study of specific lawyering practices in context may not even be amenable to broad sampling. *See* Anthony G. Amsterdam, *Telling Stories and Stories About Them,* 1 CLINICAL L. REV. 9 (1994) (offering an example and defense of interpretive study of narratives in a single case); *see generally* THE RHETORIC OF LAW (Austin Sarat & Thomas R. Kearns eds., 1994) (including several rhetorical analyses of single cases or other events). In any event, initial interpretive forays such as the present research may provide guidelines for more comprehensive samplings of legal discourse in the future.

The sample of cases, although small, also does not appear to be biased in any ways that are significant for the present research. Cases decided by juries are certainly atypical, accounting for only two to five percent of all cases filed. *See* Galanter, *supra* note 3, at 74 & nn.37-38 (finding that percentage of federal cases tried to juries declined from 5.1% in 1961 to 2.0% in 1991; similar figures apply to state courts); Priest, *supra* note 3, at 128 & n.54 (2% to 4% of cases filed in Cook County from 1959 to 1979 tried to juries); Saks, *Do We Really Know?, supra* note 8, at 1230 & n.294 (noting that juries decided 1.6% to 4.7% of state court tort cases in 1988, based on National Center for State Courts report). It is true, moreover, that transcripts are ordinarily available only if the case is worth enough for at least one of the parties to order daily copies, or if the case is appealed, which also tends to occur in accident cases only if the case is worth a substantial amount. In three of the four cases studied, the damages sought or awarded exceeded $1 million. But this does not bias the sample with respect to any of the cognitive dynamics examined other than the severity effect. *See infra* notes 258-84 and accompanying text. And even though the sample includes few if any nonsevere injuries, if the attorneys' discourse in these cases does *not* suggest that jurors are subject to the severity effect, the research would provide evidence refuting the effect, which would itself be a worthwhile finding.

THE IMPORTANCE OF RHETORIC. The project of studying attorneys' rhetoric seems to run up against the observation of J. Alexander Tanford, who has written that "jurors are not swayed by extralegal tricks, techniques and rhetoric of lawyers," but instead "base their decisions on the merits of the case as filtered through their common sense."

case, *Butler v. Revere Copper & Brass, Inc.*,[22] referring to others as appropriate.

Butler is a fairly simple case. George Butler, a truck driver, was sent by his company to pick up a load of industrial machinery at Revere's plant and take it back to be fixed at his company's shop. Revere's employees loaded the machinery onto Butler's truck with a crane. Butler then tried to put a tarpaulin over the load; he fell, landed on his head, and was seriously injured. There was no evidence of how he fell: no one saw him fall, and he did not remember what happened.

The facts, for the most part, were not in dispute. But causation, reasonableness, and responsibility were very much in dispute. The accident might have been Butler's fault, or the fault of Revere's employees who did not help him with the tarpaulin, or the fault of no one. What sort of thinking by jurors do lawyers seek to promote in such a case?

TANFORD, TRIAL PROCESS, *supra* note 15, at 15 & n.10. My response to this observation is twofold. First, although research based on posttrial interviews and simulated trials has shown that the evidence is the single most important determinant of jury decisions, *id.* at 15; Visher, *supra* note 14, at 13-14; *cf.* Linz & Penrod, *supra* note 20, at 34-35 (who point out that trial preparation, the major determinant of perceived expertise, is an overriding factor in persuasiveness), it is not the only one. Rhetoric would be especially important in the considerable range of cases in which the evidence is fairly evenly balanced. *Cf.* Barbara F. Reskin & Christy A. Visher, *The Impacts of Evidence and Extralegal Factors in Jurors' Decisions,* 20 LAW & SOC'Y REV. 423, 434-36 (1986) (in "strong" cases in which prosecution presented more hard evidence, jurors' decisions were not affected by extralegal factors such as parties' personal characteristics; in "weak" cases, jurors were heavily influenced by their own values and by parties' characteristics, and in weak cases "in which the defendant's guilt was ambiguous because the prosecution did not present enough hard evidence . . . , jurors—forced to arrive at a decision—were apparently swayed by their own values and reactions to the defendants and victims"). In the negligence cases examined in this Article, the dispositive issues are ones like "reasonableness," with respect to which the evidence often does not dictate the result, even when the observable "what happened" is not in dispute. Note also that in cases tried under comparative negligence where both parties are arguably at fault (as in all of the cases studied in this Article), the exact apportionment decision is likely to be a close call even if the evidence of each party's fault is clear.

Second, it may be that Tanford, at least as indicated by the quotation above, has too narrow a view of "rhetoric" and too simple a view of "common sense." Rather, it is precisely the way lawyers argue that may provide insights into that "common sense"—how jurors think when they're "at their best," not obviously swayed by emotion or prejudice. *See* NISBETT & ROSS, *supra* note 13, at 12-13, 228-31 (on "cold" cognition); *see also* CLIFFORD GEERTZ, LOCAL KNOWLEDGE 85 (1983) ("common sense" is how we think when we're not thinking about it).

22. No. Civ. N-87-476 (WWE) (D. Conn. 1990). All citations to the transcripts are as follows: a letter indicating the case (*e.g.*, "B" for *Butler*, "G" for *Giulietti*), page number, line number. All references to *Butler* are to the transcript of proceedings dated April 27, 1990, unless otherwise indicated.

Here is how Butler's attorney begins his summation:

> George Frederick Butler, he should be an inspiration for all of us. He got on the stand and told you about how he tries to do the best he can do with what he has left. That's something that we should all aspire to and, I don't know about you, but when he was answering those questions I felt it was something that I would like to aspire to and that we hope we all do and it sort of made me a little ashamed of the times that maybe I complain about the little things that go wrong in my life because the little things that go wrong in our lives don't nearly compare to what Mr. Butler has gone through. He's beaten all the odds. He told you he continues to fight. "I want to reach that highest plateau," I think is the word that he used, and he wants to reach a higher and higher plateau.[23]

Butler's attorney then spends more than forty percent of his argument in chief detailing his client's skull fracture and its consequences—impaired memory, hearing loss, headaches, severe depression, and more—even though the medical evidence is undisputed.[24] Yet he disclaims any intention to play to the jurors' sympathy:

> [Butler is] here not asking for your charity, simply because he's not a person who ever asks for that. What he's asking you to do is give him what he's legally entitled to, what the law says he should have. He was injured because of what Revere did and that makes them legally obligated to compensate him for what they did.[25]

The lawyer then tells the story of the accident:

> Now, let me tell you why they are legally responsible. On January 20, 1986, [Butler's] life changed and it didn't have to be changed this way. . . . Robert Brown [Butler's supervisor] told you . . . that the original order for the equipment to be picked up at Revere was . . . some kind of generator, some other kind of device. When George got up to the plant, somebody at Revere told him, "You got all these things to put on." Other things [in addition to the original order] to put on the truck. George said, "Let me call back and I'll see what happens." He calls up Bob Brown . . . [who] says, "Look, they are a good customer. Do the best you can." And George is the type of person, I think we all know by now, he's going to give his best shot and he did, and he directed the crane operator at Revere and they managed to get all of the equipment on the truck. Revere wasn't satisfied with that, and you can look at the various changes in the invoices. . . .
>
> Revere wants it tarped. Now, Bob Brown doesn't understand why they want it tarped and I don't understand why they want it tarped but they want it tarped. Bob Brown told you when those generators come in, they are steam washed so what difference does it make if they get wet on the way back? . . . . But Bob Brown says,

23. B. 17.14-18.2.
24. B. 18.6-23.22.
25. B. 23.23-24.3.

"Look, if they want them on the truck upside down, do whatever you can." And George, being the type of person he is, says, "I'm going to try to do it." George takes a . . . tarp that weighed two hundred pounds, approximately, and he starts tarping that load. And he's got a heavy load, equipment that weighs thousands of pounds, and he's climbing up on the equipment trying to pull that tarp all by himself, and at least three [Revere employees], and we had to read these depositions to you because those people weren't here, . . . said they saw him struggling with that tarp. He was having trouble—that equipment is not the nice square little packages or round packages. All sort of jagged edges, so it's getting caught on all the edges. Al Brockway [one of Revere's employees] talks to him for up to ten minutes while he's putting the tarp on, watching him struggling . . . . [L]et me just read two questions and answers [from Brockway's deposition] to you because I think they are the essence of what Revere did wrong.

. . . .

My next question, "Is a part of your job to, say, take measures that will prevent people from being injured?"

Answer, "Yes, sir."

What did Mr. Brockway do? Mr. Brockway didn't lift a finger to help him with that canvas. Mr. Brockway, like everyone else . . . who was in the area, went on their 5:30 coffee break because they weren't going to do anything. It was coffee break time. "And we're going to have our coffee break and good luck, George, with the canvas. Goodbye. We're going to have our danish and our coffee and we don't care what you're doing." . . . [L]ater on in his deposition, I said, "Mr. Brockway, tell me again how come you didn't help him?" He said, "Well, maybe, morally, I should have." Well, yeah, you should have. But he didn't. And I even went so far to ask him, "Mr. Brockway, did you think it was a one-man job?" No, sir. He knew it wasn't a one-man job, but he did nothing, absolutely nothing. What would it have taken to walk to the edge of the truck, straighten out the canvas a little bit, so that George could pull it a little easier? . . .

It's that kind of attitude, it's that kind of carelessness that resulted in this injury. Wouldn't have taken very much. Mr. Brockway told you it was his job. And he didn't do it. He didn't do it for the sake of a cup of coffee.[26]

In the remainder of the argument in chief, nearly a quarter of it, counsel speaks to the jurors about damages:

Now, when you go in and deliberate, the Judge will give you instructions on the law and I'm sure he'll talk about the testimony and the evidence. You're ultimately going to come down with the responsibility of trying to figure out how to evaluate this case.

. . . .

26. B. 24.4-27.24.

> Now, how to award damages to Mr. Butler, and that's a very difficult chore and there is no formula. . . .
>
> . . . .
>
> . . . I don't envy your task. It's a difficult, very difficult task.
>
> Now, you hold his only chance. This is the last place, the only place he can come. You're the only people who can attempt to make him whole, as far as money can do it. Granted, money really can't do it . . . . How can you compare [the damage figure the attorney suggests] to what Mr. Butler has gone through since 1986 and is going to have to continue to go through for the rest of his life? I don't know. But it's a job that you've been chosen to do and I have full confidence that you'll make your best effort to do.[27]

Just what are we to make of this kind of talk? Much of it may sound perfectly unremarkable, even clichéd. But why should a lawyer who knows that jurors will be instructed[28] to consider all elements of

27. B. 27.25-28.6, 30.4-23.

28. The judge's instructions in *Butler* (B. 40.3-71.11) are nearly half again as long as both closing arguments combined. The instructions on the elements of the prima facie case and comparative negligence occupy about forty percent of the total (B. 52.5-65.23). Excerpts follow:

> Okay. Here's where we go to the law. I'll tell you about the law in this case. You've got to take the law from me. If you think the law is wrong and ought to be changed, you go to Congress or try to persuade the Courts through really law journal articles that are written, things like that, to change the law, but the law is as I give you the law.
>
> In this case, the plaintiff is claiming money damages to make him whole. . . . The theory of the plaintiff is that the defendant was negligent. Now, to prevail in this case, the plaintiff must prove by a preponderance of the evidence [the judge has already explained this concept] that the defendant was negligent and that such negligence was a proximate cause of the injuries to the plaintiff. . . . The claim of the plaintiff here is that the defendant, through the defendant's employees, was negligent in leaving the plaintiff to tarp the cargo of that truck on his own, and that negligence is what caused his injury. There are two essential elements to the claim. One, that the defendant's employees were negligent in a manner specified by the plaintiff and that their negligence was a proximate cause of the injuries to George Butler. If the plaintiff fails to prove either one of those elements by a preponderance of the evidence, then you must find in favor of the defendant, Revere.
>
> Negligence is a breach of the duty that one party owes to another party. It is the doing of some act that a reasonably prudent person would not do under similar circumstances, or the failure to do something that a reasonably prudent person would do under similar circumstances. In other words, it's the failure to use ordinary care under the circumstances. Ordinary care is never an absolute. In deciding whether a person has used ordinary care in a given situation, you must consider the person's conduct in light of all of the surrounding circumstances shown by the evidence in the case. Ordinary care is not necessarily the care which you personally think ought to have been used, but that care which a reasonably prudent person would have used. The standard is that of a reasonably prudent person, not a careless person, not an ultra-careful one, but a reasonably prudent one.

That standard must be considered in light of the obligation of George Butler to assure himself that his load was safely secured before driving the truck. Now, you've heard that the control here is not disputed, the responsibility and contract for loading the truck was clearly on the plaintiff. . . .

One test of the extent of a duty of ordinary care is to be found in the foreseeability that harm may result if that care is not exercised. . . .

In assessing whether an entity charged with negligence has or has not used ordinary care, you must consider all of the surrounding circumstances, and circumstances of slight danger, a slight amount of care might be sufficient to constitute ordinary care under the circumstances, while in circumstances of great danger, a corresponding higher degree of care would be required . . . . In other words, I say to you that one thing you could consider is a pilot in an airplane has to take a little bit more care in his daily operation of that airplane than perhaps the driver of a subway train on prescribed tracks has to exercise. . . .

. . . .

All right. The plaintiff must prove that the defendant, through its employees, was negligent by a preponderance of the evidence, as I've described that term. There is never a presumption that just because someone has been injured that anyone was negligent or that anyone was at fault in causing that injury.

. . . .

The plaintiff must do more than prove the negligence of the defendant. The plaintiff must prove that the negligence was a proximate cause or a substantial factor of causing injury to George Butler. Proximate cause, as we use that phrase in the law, means that cause or act which, as a natural sequence, produces the injury and without which the injury would not have occurred. In other words, the defendant's conduct, if found to be negligent, must be a substantial factor in producing the injury and not a mere condition of or incident to the injury.

This does not mean that the law recognizes only one proximate cause, consisting of only one factor or thing, or the conduct of only one person causing the harm. On the contrary, many factors or things, or the conduct of more than one person, may operate at the same time, either independently or together, to cause harm; and in such case, each may be a proximate cause. . . .

If the plaintiff should prove the defendant to have been negligent through its employees, but should fail to prove that such lack of proper care was a material or essential cause of the plaintiff's injuries, then the plaintiff would not be entitled to recover and your verdict would be for Revere. So, let's discuss this comparative negligence situation.

The defendants allege that the plaintiff was negligent in his own conduct. The defendant says in effect that if the plaintiff was injured, it was because of his negligence and not because of negligence or omissions on the part of the defendant's employees. The plaintiff was under the duty to use the same standard of care for his own safety and to avoid suffering injury as a reasonably prudent person would under the circumstances . . . and the defendant has a right to assume that the plaintiff will take this ordinary care for his own safety . . . . This is exactly the same kind type of duty I told you about as being incumbent on the defendant. . . .

. . . .

Now, what do you do if you find that there is comparative negligence in this case? If you find that the plaintiff, George Butler, was comparatively negligent, then you must consider what we call in Connecticut the comparative negligence rule. That rule provides that in a cause of action based upon negligence, the plaintiff's negligence shall bar recovery if such negligence was equal to or greater than the negligence of the defendant. If the plaintiff's negligence was less than the

the prima facie case spend only the few paragraphs quoted above on the highly contested issues of duty, breach, and causation, and the largest portion of his argument on the undisputed issue of his client's injuries? Why should characterizing George Butler as a "fighter" be at all relevant to jurors' determination of who is responsible for the accident? Defendant Revere's attorney uses a rather lengthy analogy to explain why his client's employees had no duty to help Butler with the tarpaulin; is this likely to lead jurors to conclude that Revere was not responsible?[29] Is it significant that lawyers sometimes discuss the case by addressing jurors in the second person? And what, if anything, does drawing jurors' attention to their responsibility for deciding have to do with how the lawyers want them to decide? In short, what are advocates presuming about how jurors think about responsibility for accidents, if so much of the argument apparently has so little to do with the legal doctrine of negligence on which the jurors are instructed?[30]

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negligence of the defendant, then any damages allowed shall be diminished by the proportion of the negligence attributable to the plaintiff.

And I'll explain that as follows: if you combine every act and omission of the plaintiff and the defendant which you find contributed to the plaintiff's injuries,then you have a total of 100 percent of the negligence involved. You must then determine how that 100 percent is to be apportioned between these parties. That is, you assign a percentage figure to each party that represents the degree of negligence you find applicable to that party. . . .

B. 52.5-54.3, 54.13-15, 54.22-55.8, 55.17-22, 56.12-57.3, 57.10-58.4, 58.22-59.15. The judge then instructs the jurors on damages (60.9-65.23), how to complete the interrogatory or special verdict form (59.16-19, 65.24-69.3), and the deliberation process (69.4-71.11). An hour into deliberations, the jurors asked to hear the full definition of negligence again, and the judge repeated his charge on all items other than damages (74.21-82.4).

29. Revere's attorney argues:

Let's bring it down to something that all of us are familiar with. Let us assume that a piece of equipment in our own home, a combination ice box/deep freeze for example, breaks down. We call a repair person. They say, "We've got to take it to our shop." He can't fix it in your kitchen. It's heavy. I wouldn't expect one of you ladies to help him, but one of the gentlemen being at home might willingly assist that driver in putting the equipment, a refrigerator/freezer on the driver's truck and then you walk away. You go back about your business. It isn't your job to secure or do anything further with respect to that load. And then while that truck is parked in your driveway, the driver, for some unknown reason, falls from the truck and is injured. Does that make you legally liable? Does that oblige you to pay compensation to this truck driver? Certainly not. It would be ridiculous. And that, on a larger scale, is exactly what the situation was in this case.

B. 33.22-34.13.

30. Persuasion, of course, encompasses more than an appeal to reason. Classical rhetorical theory includes appeals to the character of the speaker (the ethical argument) and the emotions of the listener (the pathetic argument) as well as to reason (the logical argument). *See* ARISTOTLE, RHETORIC bk. 1, ch. 2, at 1356 (W. Rhys Roberts trans., 1954);

Several knowledge structures and inferential habits—a collection rather than a formal model—help us to answer these questions.[31] The first is *prototype theory,* which posits that we organize what we know about people and situations into categories oriented around prototypes. Jurors' prototypes of the "reasonable person," for example, may consist of exemplars or best instances of "reasonable behavior under the circumstances," often in narrative form, or a summary of features abstracted from individuals they perceive to be reasonable. When asked to decide whether a party behaved reasonably, jurors, according to the prototype theory, would compare features of the person and the person's conduct to the characteristic features of the prototype, and classify the party's conduct as "reasonable" if it sufficiently resembles the prototype.[32]

The second relevant tool of ordinary judgment is the *simulation heuristic.* When asked to identify the cause of an outcome, especially a negative one (*e.g.,* an accident), people tend to imagine how things might have turned out otherwise. They mentally simulate a counterfactual scenario that does not contain the accident; they do so more easily when they believe the actual events leading to the accident are unusual. Jurors employing the simulation heuristic would select as the cause of the accident the actual event preceding the accident that most stands out as deviant or unusual, because that is the event that can most easily be imagined to have occurred otherwise—the event that can most readily be mentally "undone" so as to avoid the accident.[33]

CORBETT, *supra* note 20, at 37-94 (discussing the three modes of persuasion). Some of what we find in closing arguments certainly reflects ethical and emotional appeals, but this does not undermine this Article's presumption that the logical appeal is crucial to the persuasiveness of summations.

More specifically, the logical arguments attorneys make to jurors may be understood in terms of the classical rhetorical model of the enthymeme. The enthymeme differs from the deductive syllogism in that (1) it is based on a major premise whose truth is probable rather than certain, and (2) the major premise is usually implicit. Enthymematic argument is peculiarly suited to rhetoric because the truths of human behavior, the subject of forensic advocacy, are generalizations, not the certainties of classical geometry or physics. *See* CORBETT, *supra* note 20, at 59-66. My effort to describe some of the cognitive frameworks attorneys think jurors will bring to bear in the accident case is thus analogous to the search for the implicit major premises in enthymematic argument.

31. I do not contend that these are the only structures or heuristics relevant to jurors' decision-making in general or in negligence cases in particular. For discussions of other relevant cognitive psychological processes, *see* sources cited *supra* note 15. Nor are all of these cognitive dynamics equally important, or even necessarily present, in every accident case.

32. *See infra* notes 60-139 and accompanying text (prototype theory).

33. *See infra* notes 140-81 and accompanying text (simulation heuristic).

A third inferential habit jurors may employ is the *fundamental attribution error.* People tend to attribute other people's behavior and its (negative) consequences to those people's enduring dispositions or traits, while attributing their own behavior and its (negative) consequences to the circumstances. In other words, "I acted as I did because anyone in that situation would have behaved similarly; but he acted as he did because he is that kind of guy." Jurors who commit the fundamental attribution error when determining responsibility for an accident would tend to think that at least one of the parties must be at fault, and would attribute that fault based on a perception that one of the parties is the sort of person who deserves blame.[34]

A fourth judgmental habit is described by the *severity effect.* People's assessments of responsibility for negative outcomes tend to be biased by the severity of the harm: the more serious the victim's injuries, the more at fault the person who caused those injuries is judged to be. That is, the gravity of the harm influences not just the damage award (as it ought to), but also the attribution of responsibility, to which it ought to be irrelevant. The severity effect indicates that jurors may hold defendants in negligence cases liable for reasons other than proof of legal fault.[35]

In addition, jurors may cognitively "frame" the case in different ways. They may conceive of the evidence and the arguments as a description of an objective reality—of events that took place in a world "out there" and that dictate the assignment of responsibility. But jurors may participate more actively in the creation of legal reality; in this cognitive frame, assigning responsibility is a performance rather than a passive "read-off" of reality.[36]

This collection of judgmental tools leads us to expect certain patterns in the ways that lawyers try to persuade jurors to reason about fault, causation, and responsibility. In general, we would expect each attorney to offer the jurors counterfactual scenarios in which the other party took some precaution that prevented the accident. At the same time, the attorney would try to describe the actual accident story so that her client's conduct matches prototypes of good behavior under the circumstances and the other party's conduct deviates from those prototypes. We would also expect the lawyer to describe the personalities of the parties in ways that lead jurors to conclude that the client is the type of person who acts in conformance with prototypes of reason-

34. *See infra* notes 182-257 and accompanying text (fundamental attribution error).
35. *See infra* notes 258-84 and accompanying text (severity effect).
36. *See infra* notes 285-313 and accompanying text (cognitive framing).

able behavior (*i.e.*, in such a way as not to cause accidents like the one at issue in the case at bar) and that the other party is the sort of person who acts irresponsibly. Finally, we would expect the lawyer who believes that the client would be disadvantaged by a passive approach to the case to engage jurors as more active decision-makers.

In this Part, I will begin with a general description of knowledge structures and judgmental heuristics. I will then examine in greater detail the specific structures and heuristics we would expect jurors to use. For each of these, I will briefly survey the leading research and then apply those findings to the attorneys' arguments. In Part III, I will conclude by summarizing what the cognitive analysis of rhetoric can teach us about negligence in action.

B. Knowledge Structures and Judgmental Heuristics

Jurors who decide a negligence case must make judgments. According to doctrine, the most important of these are typically: did this defendant and this plaintiff behave reasonably? And if not, did the defendant's or the plaintiff's carelessness (or both) cause the plaintiff's injuries? What makes these judgments difficult, even under the best of decision-making conditions, is that they are uncertain. The juror may know to a greater or lesser extent what the defendant did, but not whether to characterize it as blameworthy; the juror may know more or less "what happened," but not why it happened. The juror must go "beyond the information given," in Jerome Bruner's famous phrase,[37] to infer a conclusion.

People make judgments under conditions of uncertainty all the time; they classify, predict, and attribute causal responsibility on the basis of imperfect information.[38] Which candidate for the job should I hire? Can I trust what this person is telling me? Why did that person's marriage break up? In these and countless other instances, people make inferences from the limited information available to them.

Cognitive and social psychology indicate that people intuitively use two general sorts of tools to make such judgments. People define and interpret information in terms of knowledge structures, and use judgmental heuristics to make inferences from what they know to what they do not know.[39] Without these knowledge structures,

37. JEROME BRUNER, BEYOND THE INFORMATION GIVEN (1973).

38. The classic work is JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahneman et al. eds., 1982).

39. *See generally* NISBETT & ROSS, *supra* note 13, at 6-8 (discussing the intuitive tools of "knowledge structures" and "developmental heuristics").

thought would be nearly inconceivable; our mental life would be anarchic and unintelligible.[40] Judgmental heuristics reduce complex inferential tasks to relatively simple, feasible operations.[41] Together, these ways of organizing and using information allow people to make the innumerable interpretations and decisions necessary for everyday functioning without psychic overload. They are useful whether the object of knowledge is nonsocial or, as in the case of juror judgments about fellow human beings, social.[42] And while people typically employ these judgmental tools to make relatively rapid, even "automatic," judgments, they are also involved in the more deliberate processes of juror decision-making.[43]

People perceive, store, and retrieve what they know in terms of knowledge structures such as theories, schemas, scripts, and cultural

40. SUSAN T. FISKE & SHELLEY E. TAYLOR, SOCIAL COGNITION 97 (2d ed. 1991).

41. NISBETT & ROSS, *supra* note 13, at 7.

42. There is some disagreement among social and cognitive psychologists whether cognitive processes differ for social and nonsocial objects of knowledge. *See, e.g.,* Thomas M. Ostrom, *The Sovereignty of Social Cognition, in* 1 HANDBOOK OF SOCIAL COGNITION, *supra* note 21, at 1, 7-17 (contrasting social and nonsocial knowledge). For a list of differences between social cognition and nonsocial cognition generally, see FISKE & TAYLOR, *supra* note 40, at 18-19.

Note that the juror judgments with which this Article is concerned differ from many social judgments in ordinary life in at least three ways. First, jurors have the opportunity to ponder; they are not expected to make the sorts of snap judgments often required of us when we, for instance, engage in a conversation. *But see infra* note 43 (discussing automatic versus deliberate information processing and heuristics). Second, jurors confer with one another, and this group decision-making may mitigate an individual juror's erroneous use of structures or heuristics. *See* NISBETT & ROSS, *supra* note 13, at 266-67 (but note that the best predictors of jury decisions are the jurors' initial views at the start of deliberations; *see supra* note 14). Third, jurors are not engaged in interaction with the object of their judgment, as is the case in much social cognition; rather, they are mere observers (even if jurors "frame" the case actively rather than passively (*see infra* notes 285-313 and accompanying text), they cannot adjust their judgments based on feedback from the parties).

43. For the position that jurors tend (or would be expected) to process information using conscious, systematic strategies rather than intuitive heuristics, *see* Tanford & Tanford, *supra* note 15, at 751-52 and nn.63-68; *cf.* Steven J. Sherman & Eric Corty, *Cognitive Heuristics,* in 1 HANDBOOK OF SOCIAL COGNITION, *supra* note 21, at 189, 245-46 (noting that the more important the task, the greater the decision-maker's reliance on formal, systematic reasoning rather than heuristics). *But cf.* Galen V. Bodenhausen & Meryl Lichtenstein, *Social Stereotypes and Information-Processing Strategies: The Impact of Task Complexity,* 52 J. PERSONALITY & SOC. PSYCHOL. 871 (1987) (showing that the more complex the judgmental task, the greater the reliance on heuristics, specifically stereotypes). It seems to me that even though jurors are likely to conceive of their task as important, to a great extent they lack systematic, normative models for reasoning: *i.e.,* there is no rule-like way to determine "reasonableness," at least not according to the standard jury instructions. *See infra* note 86 and accompanying text. And prototype analysis suggests that jurors are likely to override the formal reasoning method (rule-element analysis) when determining liability. *See infra* notes 67-74, 78-79 and accompanying text.

models. These structures are used to describe how the world is and how it works.[44] For instance, people have a schema for "dog" which contains certain features. This schema allows them to decide whether the source of a given, potentially ambiguous set of stimuli is a dog. And if they decide that it is, that decision creates a set of expectations and inferences about other, as yet unknown features of the animal.[45]

A script, similarly, is a structure for a social event or series of events. By prescribing one or more scenarios for how things typically happen, and thus defining the social roles of the people involved, the script guides how people perceive and remember actual events, classify and understand the participants' behavior, and judge whether that behavior is normal or deviant. It also guides how people infer missing information from what is explicitly provided.[46] For instance, if someone says only that "John went to a restaurant. He asked the waitress for coq au vin. He paid the check and left," the "restaurant script" allows the listener to infer that John ate the food he ordered—an event not actually mentioned in the account.[47] A cultural model for a complex concept like "marriage" may combine schemas (for what constitutes a marriage) and scripts (for how marriages are supposed to proceed) into an implicit framework that allows people to make sense of marital successes, difficulties, and dissolutions.[48]

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44. *See* NANCY CANTOR & JOHN F. KIHLSTROM, PERSONALITY AND SOCIAL INTELLIGENCE 78-106 (1987); FISKE & TAYLOR, *supra* note 40, at 96-179; NISBETT & ROSS, *supra* note 13, at 28-35; Keith J. Holyoak & Peter C. Gordon, *Information Processing and Social Cognition, in* 1 HANDBOOK OF SOCIAL COGNITION, *supra* note 21, at 39, 47-51; David E. Rumelhart, *Schemata and the Cognitive System, in* 1 HANDBOOK OF SOCIAL COGNITION, *supra* note 21, at 161; Robert S. Wyer, Jr. & Sallie E. Gordon, *The Cognitive Representation of Social Information,* in 2 HANDBOOK OF SOCIAL COGNITION, *supra* note 21, at 73. For a survey of the literature, especially as it relates to personality, see Jerome L. Singer & Peter Salovey, *Organized Knowledge Structures and Personality: Person Schemas, Self Schemas, Prototypes, and Scripts, in* PERSON SCHEMAS AND MALADAPTIVE INTERPERSONAL PATTERNS 33-79 (Mardi J. Horowitz ed., 1991).

45. NISBETT & ROSS, *supra* note 13, at 32-33. "[U]pon deciding on the basis of a particular animal's appearance that it is a 'dog,' one makes the inferential leaps that it is trainable, capable of loyalty, able to bark, and likely to chase cats but is unlikely to climb trees, purr, or wash its coat." *Id.* at 33. On the contrast between the "classical" view of schema classification or category membership and the prototype view, *see infra* note 60 and accompanying text.

46. A classic work is ROGER C. SCHANK & ROBERT P. ABELSON, SCRIPTS, PLANS, GOALS AND UNDERSTANDING (1977); *see also* FISKE & TAYLOR, *supra* note 40, at 119-20; NISBETT & ROSS, *supra* note 13, at 34-35 (describing various scripts).

47. *See* SCHANK & ABELSON, *supra* note 46, at 36-68 (discussing applications of the restaurant script).

48. *See* Naomi Quinn, *Convergent Evidence for a Cultural Model of Marriage, in* CULTURAL MODELS, *supra* note 14, at 173-92.

These sorts of knowledge structures, as noted above, are necessary for thinking and understanding, but they can also lead to errors when used inappropriately.[49] If a person thinks he sees a cat in the

49. The use of knowledge structures and heuristics does not in and of itself entail judgmental bias or error (*see infra* notes 52, 55-57 and accompanying text). Scientists as well as laypeople use knowledge structures and heuristics. Hence, NISBETT AND ROSS, *supra* note 13, at 3, call laypeople "intuitive scientists." (*See infra* for a discussion of the appropriateness of positing this as a norm for the inferential processes of ordinary people.) But laypeople tend to differ from professional scientists by using structures and heuristics inappropriately. *See* NISBETT & ROSS, *supra* note 13, at 7-10, 17-18.

Although Nisbett and Ross are concerned with inferential error (as the subtitle of their book indicates: "Strategies and Shortcomings of Social Judgment"), they take pains to explain that it may be perfectly sensible for laypeople to use the cognitive structures and heuristics they describe. As noted *supra* text accompanying notes 40-41, some structuring and employment of heuristics is absolutely necessary to get on with life at all. Moreover, it is often quite rational for people to rely on such heuristics rather than to take the time and expense to gather and analyze information to the extent that would be required to make inferences according to professional scientific standards. *See* NISBETT & ROSS, *supra* note 13, at 254-55 (noting the benefits of intuitive heuristics); FISKE & TAYLOR, *supra* note 40, at 13 (finding that ordinary people are "cognitive misers" who make pragmatic use of limited cognitive capacities); *id.* at 395-97 (general evaluation of processes of social inference); *see also* David M. Messick, *Equality as a Decision Heuristic,* in PSYCHOLOGICAL PERSPECTIVES ON JUSTICE 11, 12-13 (Barbara A. Mellers & Jonathan Baron eds., 1993) (arguing that decision heuristics often are efficient and roughly as successful as normative decision-making procedures); Scott A. Hawkins & Reid Hastie, *Hindsight: Biased Judgments of Past Events After the Outcomes Are Known,* 107 PSYCHOL. BULL. 311, 323-24 (1990) (explaining that hindsight bias (discussed *infra* note 193) "represents the dark side of successful learning and judgment," and may even be optimal in many judgment tasks).

Even so, reviewers of *Human Inference* have responded that Nisbett and Ross have drawn an unduly negative picture of human inferential skills. Elizabeth Loftus & Lee Roy Beach, *Human Inference and Judgment: Is the Glass Half Empty or Half Full?,* 34 STAN. L. REV. 939 (1982). For instance, it has been argued that the research Nisbett and Ross present is based on static, individual inferential tasks, while in real life decision-making is dynamic, occurring in sequences of tasks over a period of time, and in the course of this ongoing decision-making we receive feedback, are able to correct for earlier misjudgments, and are usually able to "keep things generally on track." *Id.* at 955. This may be true in general, but it does not apply to juror determinations of reasonableness and responsibility, in which the evidence is presented, the attorneys summarize it for the jurors, and the jurors decide; thus juror decision-making, although complicated, takes place without the benefit of feedback (*cf.* Galanter, *supra* note 3, on jury as discontinuous decision-maker). In any event, this Article does not need to take a position on the half empty/half full question. (It may be of interest to note that in the years since the publication of *Human Inference,* Nisbett and others have conducted research indicating that laypeople may improve their inferential practices by learning and using rules of statistical, causal, and cost-benefit reasoning instead of the heuristics and biases identified in earlier research. *See* RULES FOR REASONING (Richard E. Nisbett ed., 1993).)

For an argument that cognitive habits that appear to reflect bias or error when people are conceived of as "intuitive scientists" may be quite rational if people are conceived of as "intuitive politicians" who make decisions under conditions of accountability to various constituencies, *see* Philip E. Tetlock, *The Impact of Accountability on Judgment and Choice: Toward a Social Contingency Model, in* 25 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 331, 352-56 (Mark P. Zanna ed., 1992) (discussing how preconceptions can

yard and accordingly approaches it with the intention of petting it, he will be unpleasantly surprised if the animal turns out to be a raccoon and he does not adjust his schema appropriately.

People also use judgmental heuristics to go from the information they have to a needed classification, prediction, or attribution.[50] Two of the most important are the availability and representativeness heuristics. Using the availability heuristic, people judging the frequency or predicting the likelihood of certain events, or judging the causal relationship between events, tend to be influenced by the accessibility of the events to their perception, memory, or imagination.[51] Where the most accessible events are also the most frequent, probable, or causally efficacious, the availability heuristic will lead to correct inferences. For example, if asked to estimate whether more words begin with "R" or "L," people would answer by sampling their memory rather than by counting entries in a dictionary. Finding words beginning with "R" easier to recall, they would be likely to guess that such words are more frequent than words beginning with "L"—and they would be correct.[52] But the most accessible information is not always the most frequent or probable.[53] In such cases, using the availability heuristic can lead to mistakes. For instance, people estimate the number of words beginning with "R" to be greater than the number of words with "R" as the third letter, even though the latter are much more numerous, because it is easier to recall words beginning with "R."[54]

Using the representativeness heuristic, people classify unfamiliar objects by "assess[ing] the degree to which the salient features of the object are representative of, or similar to, the features presumed to be characteristic of the category."[55] "[T]he representativeness heuristic is a legitimate, indeed absolutely essential, cognitive tool,"[56] and often

create judgmental biases and offering several methods to limit their effect). Tetlock's observations may have some limited relevance to juror decision-making, because jurors usually will have to explain their positions to one another during deliberations, although collectively they are not accountable to the public (*see supra* note 7 on jury's insulation from public scrutiny).

50. *See* FISKE & TAYLOR, *supra* note 40, at 381-91; NISBETT & ROSS; *supra* note 13, at 17-28; Sherman & Corty, *supra* note 43.

51. NISBETT & ROSS, *supra* note 13, at 18-23.

52. *Id.* at 23.

53. Our perception, storage, and retrieval of information are biased by such factors as how striking the information is (its salience) and the subjective features of our knowledge base. *See id.* at 19-23.

54. *Id.* at 19, 21.

55. *Id.* at 24.

56. *Id.* at 27.

yields correct classifications. For instance, people tend to believe that outcomes resemble the process that produced them, so that a random process should yield results that look random. People are therefore correct to suspect that an all-white or all-male jury is more likely to have been the result of biased selection than is a jury that represents the general population more proportionately.[57] But like other cognitive tools, the representativeness heuristic can lead to error when used inappropriately. For example, people tend to believe that *any* sample of outcomes, however small, generated by a random process must itself appear random; hence the "gambler's fallacy" that after a run of heads, the next flip of the coin is more likely to be tails because a sequence including heads and tails better matches the random process of flipping the coin.[58] The representativeness heuristic also underlies the belief that causes must resemble effects: for instance, the widespread prescientific belief that the cause of (or the cure for) an illness must resemble the symptoms or their opposites (*e.g.*, the belief that drinking milk is good for an upset stomach because it "coats" the "irritated lining" of the stomach).[59]

These basic concepts will appear throughout the following discussion of the cognitive habits most relevant to jurors' evaluation of accident cases. Prototype theory, for instance, develops the concepts of schemas and scripts as knowledge structures. The availability and representativeness heuristics are involved in lay judgments about causation and fault. And a good deal of advocates' rhetoric may be understood as an effort to make favorable facts, schemas, and prototypes as available as possible to jurors.

C. Prototype Theory: The Structure of Juror Judgments

Research in cognitive psychology and linguistics indicates that jurors think about responsibility for accidents by using intuitive models or prototypes of how stories go and how people should behave. This way of thinking differs from, but is largely consistent with, the rule-element thinking prescribed by negligence law; the law's elements are sufficiently general to accommodate jurors' use of prototypical stories and behaviors. An analysis of lawyers' rhetoric reveals exactly how

57. *Id.*

58. *Id.* at 24-25.

59. *See id.* at 26-27, 113-38; FISKE & TAYLOR, *supra* note 40, at 59; THOMAS GILOVICH, HOW WE KNOW WHAT ISN'T SO 133-36 (1991); *see also infra* note 156 (noting the general belief that "big" effects, *e.g.*, severe injuries, must have "big" causes, *i.e.*, egregious misconduct).

they invoke specific prototypes and for what strategic purposes they choose or decline to do so.

(1) Theory and Research on Prototype Use

(a) Generally

Prototype theory explains how people categorize knowledge. Our concepts about people and situations are not organized according to classical set theory, as lists of those qualities or characteristics necessary and sufficient for a person or thing to be a member of the set. Instead, social concepts are "fuzzy sets," structured around prototypes.[60] The prototype may be represented by exemplars or best instances of the category (*e.g.,* the category "national political figure" as exemplified by Ted Kennedy), or by a summary consisting of features abstracted from individual instances (*e.g.,* long experience in office, well-established political machine, actual or potential personal scandal).[61] Prototype theory then posits a judgmental heuristic: when confronted with the task of classifying a person or event, the person making the judgment will compare features of the person or event to the characteristic features of the prototype and will classify the person or event as a member of the category if it sufficiently resembles or corresponds to the prototype.[62] Classification on the basis of prototypes is thus an instance of the representativeness heuristic.[63]

The common law reasoning of appellate judges, according to some, displays the operation of prototype theory. Edward Levi wrote that "[t]he basic pattern of [common law] legal reasoning is reasoning by example."[64] Levi famously described how the liability of sellers of products for injuries caused to third parties who did not buy the products from the sellers developed through the accretion and subtraction

60. CANTOR & KIHLSTROM, *supra* note 44, at 90-94 (discussing "fuzzy sets" in social psychology); LAKOFF, *supra* note 14, at 5-57 (surveying same idea in linguistics and its origins in philosophy of language and cognitive psychology).

61. CANTOR & KIHLSTROM, *supra* note 44, at 90-91. Cantor and Kihlstrom explain that the organization of person prototypes is more complicated than this; *e.g.,* people may represent some categories by exemplars and others by feature sets, and may shift from one mode of representation to another depending on their relevant knowledge. *Id.* at 91-92.

62. *Id.* at 107-14; LAKOFF, *supra* note 14, at 39-57. These processes of comparison and clarification need not be conscious.

63. *See* CANTOR & KIHLSTROM, *supra* note 44, at 111-12 (discussing how use of representativeness heuristic meshes with prototypical structure of fuzzy concepts); NISBETT & ROSS, *supra* note 13, at 37 (describing the role of the representativeness heuristic in the selection of schemas). On the connection between schema theory and prototype theory, *see* Rumelhart, *supra* note 44, at 163.

64. EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 1 (1949).

of examples of products held to be (or not to be) sufficiently or "inherently" dangerous. More generally, Karl Llewellyn argued that the appellate judge should seek to identify the "situation-type" represented by the facts at bar and then uncover the law "immanent" in that sort of situation.[65] Thus, if jurors decide responsibility for accidents by relying on prototypes, they would, at least to some extent, be reasoning the way appellate judges do,[66] although not necessarily in the rule-element fashion prescribed by the instructions given to them.

Research using simulated criminal cases confirms that mock jurors reason by using prototypes: they judge guilt or innocence on the basis of how the evidence corresponds to their preexisting prototypical conceptions of the offense, rather than by strictly adhering to the verdict categories the law defines.[67] Mock jurors' prototypes partially conform to the law,[68] and to that extent jurors would reach the same results whether they use prototypes or legal definitions; where the two diverge, however, mock jurors seem to rely on prototypes. In a series of experiments, Professor Vicki Smith began by showing that people have naive or lay conceptions of various crime categories. They organize these conceptions prototypically rather than in terms of necessary and sufficient elements; *i.e.,* people are more likely to classify a given event as a crime the more features characteristically associated with that crime the event contains.[69] Professor Smith next showed that, in most cases, scenarios more closely corresponding to the layperson's prototypical crime yielded higher conviction rates than did less prototypical scenarios.[70] Finally, she showed that subjects who heard the judge's instructions on the actual elements of the crime before reading the fact scenarios reached the same verdicts as those who did not.[71] Thus the mock jurors relied on their preexisting prototypes instead of

65. LLEWELLYN, *supra* note 3, at 44, 122.

66. This is not to imply that jurors would necessarily rely on the same prototypes as appellate judges would.

67. Smith, *Prototypes,* supra note 9.

68. *Cf. infra* note 76 and accompanying text (Pennington and Hastie's "story model," in which crime verdict categories partially conform to lay conceptions of intentional behavior).

69. *Id.* at 859-63. For instance, two experimental scenarios might each equally satisfy the *legal* definition of "robbery" as the taking of property from the victim by force or threat of force, yet one contains more features *popularly* associated with robbery—say, that the perpetrator is armed. Smith showed that the more such features in the scenario, the more subjects identified the scenario as a robbery.

70. *Id.* at 863-65.

71. *Id.* at 865-68.

the judge's instructions in determining guilt.[72] Smith's more recent research has largely confirmed that mock jurors rely on these prototypes, although she has found that instructing jurors that certain features of the prototype are not legal elements of the crime does improve judgment in atypical cases.[73]

Jurors in accident cases will not have a preexisting prototype of negligence in general, in the way that they have prototypical conceptions of burglary and other crimes. Instead, as I will discuss below, they are likely to think in terms of prototypical scenarios for events like those leading to the accident and images of reasonable behavior under the circumstances. Prototype theory leads us to expect that jurors will determine liability by comparing the evidence to these prototypes of responsibility for accidents, rather than by analyzing each element of the prima facie case (*i.e.*, the verdict categories). To the extent that an attorney does not present an element-by-element argument, he invites jurors (by default, as it were) to think about the case in terms of prototypes—to take a global approach to responsibility for accidents, and then to retrofit their conclusions into the proper legal categories.[74]

72. *Cf.* Bert Pryor et al., *An Affective-Cognitive Consistency Explanation for Comprehension of Standard Jury Instructions,* 47 COMM. MONOGRAPHS 68 (1980) (jurors' prior attitudes toward the law affect their ability to understand the law; hearing standard instructions slightly reduces misunderstanding).

73. Smith, *Prior Knowledge, supra* note 20; *see also* Richard L. Wiener et al., *The Social Psychology of Jury Nullification: Predicting When Jurors Disobey the Law,* 21 J. APPLIED SOC. PSYCHOL. 1379, 1396-97 (1991) (finding that mock jurors based rape trial verdicts on attributions independent of jury instructions; the more familiar jurors were with instructions, the more heavily they weighed their own attributions and the less heavily they weighed instructions).

74. Of course, in some sense it is not merely unsurprising that jurors do not follow the law precisely in reaching judgments. It is the very purpose of turning some decisions over to jurors that those decisions be based on extralegal values. *See* Kaplan, *supra* note 21, at 210; *see also supra* note 3 (jury's function is to bring substantive community morality to bear on legal decision-making). Those values are supposed to be those of the community in the sense that the jurors "represent" the community rather than that the jurors are supposed to identify what their community's values are. *See* Stanton D. Krauss, *Representing the Community: A Look at the Selection Process in Obscenity Cases and Capital Sentencing,* 64 IND. L.J. 617, 654-56 (1989).

Particular prototypes, *e.g.*, those of causation and fault described below, may be understood as *mediators* between jurors' general notions of fairness and justice and their decision in the individual case. That is, jurors make the case come out "right" by the way they construe fault and causation. *Cf.* Jonathan D. Casper et al., *Juror Decision Making, Attitudes, and the Hindsight Bias,* 13 LAW & HUM. BEHAV. 291, 302-03 (1989) (noting that jurors' attitudes affect their decisions through mediation of their interpretations of evidence); *see also* KALVEN & ZEISEL, *supra* note 8, at 165 ("[T]he jury does not often consciously and explicitly yield to sentiment in the teeth of the law. Rather it yields to sentiment in the apparent process of resolving doubts as to the evidence."). The criminal

(b) Prototypical Narratives as Knowledge Structures

Jurors in a negligence case are asked to evaluate an accident—an event or series of events. We might, therefore, expect them to employ prototypes in the form of scenarios or stories.[75] That is, the relevant cognitive schemas for reasonableness and responsibility may include narratives about "how accidents like this typically occur," as well as category exemplars (*e.g.*, "the careless driver is one who resembles my teenaged son") and rule-like propositions (*e.g.*, "the careless driver is one who poses unreasonable risks to others").

Indeed, considerable psychological research indicates that jurors typically organize complex evidence into narrative form, and that their judgments and the confidence with which they hold them depend on the ease with which they can generate acceptable stories from the data.[76] This may be due to the general tendency for people to organize their experience in terms of stories.[77] And because narrative arguably

jury observed in *Frontline, supra* note 12, provides an example of how jurors may "read back" into the appropriate legal categories a conclusion derived from other considerations. Many jurors, having decided that it would be unfair to convict the defendant, determined that he didn't "know" he had a gun (one of the elements of the crime charged). Note that this example is not entirely consistent with Kalven and Zeisel's generalization; most jurors in the *Frontline* case seem to have been quite conscious that "sentiment" (or fairness or justice) pulled in the opposite direction from the ostensible meaning of the law.

75. *See, e.g.*, CANTOR & KIHLSTROM, *supra* note 44, at 100-07 (describing "interdomain" organization of social concepts: person prototypes are understood in terms of prototypical situations and episodes in which those prototypical persons act); *see also* LAKOFF, *supra* note 14, at 380-415 (explaining common-sense understanding of anger based on implicit prototypical scenarios of how people become angry and how they deal with the anger); Quinn, *supra* note 48 (discussing common sense understanding of marriage based on various implicit prototypical scenarios). Conversely, prototypical conceptions of social situations take the form of "person-situations," consisting largely of typical person-action combinations, *i.e.*, the general personality types as well as the prototypic behaviors associated with those situations. Nancy Cantor et al., *A Prototype Analysis of Psychological Situations*, 14 COGNITIVE PSYCHOL. 45 (1982).

76. The leading work is that of Nancy Pennington and Reid Hastie. *See, e.g.*, Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making*, 62 J. PERSONALITY & SOC. PSYCHOL. 189 (1992); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991) [hereinafter Pennington & Hastie, *Story Model*]. *See also* W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM 7-10 (1981) (explaining the central importance of stories to legal judgments); TANFORD, TRIAL PROCESS, supra note 15, at 14 (discussing importance of stories to juror cognition); Linz & Penrod, *supra* note 20, at 6 (describing importance of storytelling to jury comprehension).

77. *See, e.g.*, JEROME BRUNER, ACTS OF MEANING 77-78 (1990) [hereinafter BRUNER, ACTS] (noting that narrative is so basic a discourse form that it guides the child's acquisition of grammatical forms); Hayden White, *The Value of Narrativity in the Representation of Reality, in* ON NARRATIVE 1-2 (W.J.T. Mitchell ed., 1980) (discussing how narrative is the fundamental way in which we "translate knowing into telling").

represents a mode of thinking that is distinct from rule-element analysis,[78] its use would seem to encourage further departures from the sort of thinking that the instructions prescribe, even though the elements of doctrine may themselves be drawn in part from people's conceptions of how stories go.[79]

From the extensive literature on narrative and social judgment in the law, a few points are particularly relevant. First, W. Lance Bennett and Martha Feldman have argued that it is the internal structure of the story that people find credible or not, rather than its correspondence to external evidence. Specifically, audiences find stories that vary from their expectations, that leave gaps or contradict their "stock scripts" or prototypes, to be dubious. The more a story departs from the prototype, the more ambiguities and gaps at crucial junctures, the less credible the story is.[80] Hence, we would expect to find advocates organizing information about the case and the world into stories that conform to the stock scripts they expect the jurors to bring with them to the courtroom.[81]

78. *See* JEROME BRUNER, ACTUAL MINDS, POSSIBLE WORLDS 11-14 (1987) [hereinafter BRUNER, ACTUAL MINDS]. Although Bruner remarks on narrative generally, I do not mean to suggest that there is only one narrative mode of thought. On the varieties of narrative, *see, e.g.*, ON NARRATIVE, *supra* note 77.

79. According to Pennington and Hastie's "story model," for example, jurors impose order on the evidence by constructing stories from it during the trial; learn the verdict categories; and then reach a decision by matching the accepted story to the verdict categories and deciding if the fit is sufficient. The "story model" involves prototypical reasoning at the story construction stage, in that the choice of the best story involves, among other things, a judgment of coherence, which includes an intuitive comparison of the story to prior knowledge of how stories are supposed to go. It also involves prototypical reasoning at the last stage, in which the test is whether the accepted story fits well enough with the best-match verdict category. Obviously, legal rules, the elements of the crime, figure in both the second and third stages of this model. Moreover:

> The classification process [in the last stage of the model] is aided by relatively direct relations between the attributes of a verdict category (crime element) and components of the episode [or part of a story] schema .... The law has evolved so that the main attributes of the decision categories suggested by legal experts—identity, mental state, circumstances, and actions—correspond closely to the central features of human action sequences represented as episodes—initiating events, goals, actions, and states. This is not a coincidence; rather, it is a reflection of the fact that both stories and crimes are culturally determined generic descriptions of human action sequences.

Pennington & Hastie, *Story Model, supra* note 76, at 530-31.

80. BENNETT & FELDMAN, *supra* note 76, at 66-90; *cf.* White, *supra* note 77, at 23 (noting how modern historiographical convention that "real history" should be written as narrative reflects desire to impose upon reality the moral coherence of the story form).

81. *See* Lind & Ke, *supra* note 21, at 239-40 (recommending that attorney should invoke familiar scripts so that jurors will fill in the gaps with inferences favorable to the client); Amsterdam & Hertz, *supra* note 20, at 104-10 (discussing criminal lawyers' uses of

Second, the role of narratives in accident trials is not limited to matching events to prototypes; it also includes establishing differences between the two. Stories of accidents are likely to correspond to the stock scripts of everyday life, with one salient deviation: the accident itself. To explain the accident persuasively, the narrative must account for this deviation. Research in story comprehension indicates that readers will try to explain a deviation from a prototypical story (or script) by searching for another deviation and then by trying to make a causal connection linking them.[82] Hence, we might expect each attorney to construct a plausible "normal" or background scenario in which the accident does not occur, and which differs from the actual events by including something the other party did not do, or by omitting something he did do. Each attorney would thereby emphasize that his or her client behaved normally, but that the other party acted "outside the script" in some respect. The attorneys would then play to the jurors' tendency to link the two deviations causally, thus attributing causal responsibility for the accident to the other party.[83]

Third, and conversely, stories are the ideal form for justifying deviant behavior within cultural norms, because stories allow us to understand intentions within contexts; they show us the actor's reasons for acting in a way that reconciles the aberrant with the normative.[84] We would, therefore, expect attorneys to craft stories to persuade ju-

stock scripts); Steven Lubet, *The Trial as a Persuasive Story,* 14 AM. J. TRIAL ADVOC. 77 (1990) (noting that attorney needs to tell a story that is consistent with jurors' common sense and with the evidence); Philip N. Meyer, *"Desperate for Love": Cinematic Influences upon a Defendant's Closing Argument to a Jury,* 18 VT. L. REV. 721 (1994) (analyzing criminal defense attorney's manipulation of stock scripts in closing argument); Richard K. Sherwin, *Law Frames: Historical Truth and Narrative Necessity in a Criminal Case,* 47 STAN. L. REV. 39 (1994) (analyzing how director of *The Thin Blue Line* plays with audience's stock conception of how corrupt police and district attorneys frame innocent defendants).

82. John Black et al., *Comprehending Stories and Social Situations, in* 3 HANDBOOK OF SOCIAL COGNITION, *supra* note 21, at 56 (citing unpublished research of Mio and Black); *see also* Stephen J. Read, *Constructing Causal Scenarios: A Knowledge Structure Approach to Causal Reasoning,* 52 J. PERSONALITY & SOC. PSYCHOL. 288, 296-97 (citing to same research).

83. Attribution research, discussed *infra* notes 141-54 and accompanying text, leads to the same conclusion. In making causal attributions, perceivers engage in counterfactual analysis: they tend to imagine another scenario that differs from the actual series of events in some respect, and to identify the "deviant" action as the cause of the accident.

84. BRUNER, ACTS, supra note 77, at 47-50. For an example of a layperson's use of narrative in this fashion, *see* Austin Sarat & William L.F. Felstiner, *Law and Strategy in the Divorce Lawyer's Office,* 20 LAW & SOC'Y REV. 93, 114-15 (1986). Sarat and Felstiner record the conversation of a divorce client who, in order to justify her resignation to the attorney's settlement strategy, against her inclination to continue fighting a restraining order and her husband generally, breaks into a narrative about Nez Perce Indian Chief Jo-

rors that their respective clients' apparently aberrant behavior actually conformed to social norms and thus was not culpable.

There is, finally, reason to expect that narrative argument would not be distributed equally in any given case. We might in general expect plaintiffs' attorneys to tell stories; by contrast, defendants' attorneys should lead jurors to think in rule-element terms, because the plaintiff's failure to establish any one element should (as the jurors will be instructed) result in a decision for the defendant.[85] On the other hand, a plaintiff's attorney with a strong case on the evidence might let doctrine organize the argument; conversely, a defendant's attorney with a weaker rule-element case would be best advised to make broader use of narrative.

(c) The Evocation of "Reasonable Person" Prototypes

Even insofar as jurors' attention is directed to the single element of breach of duty, they are likely to reason by means of prototypes. The standard jury instruction asks jurors to determine whether the party in question acted as would a reasonable person under the circumstances.[86] Jurors are likely to address this question by using a

seph, who after many battles with U.S. government troops decided he would "fight no more." *Id.* at 114.

85. Additional experimental evidence suggests that plaintiffs receive more verdicts in their favor when complex tort trials are structured to allow the presentation of all issues in one proceeding before the jury is required to reach any decisions (unitary trial), as opposed to separated trials in which one or more issues are argued and decided separately. Irwin A. Horowitz & Kenneth S. Bordens, *An Experimental Investigation of Procedural Issues in Complex Tort Trials,* 14 LAW & HUM. BEHAV. 269 (1990).

86. The standard instruction defines "negligence" as

> the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, when prompted by considerations which ordinarily regulate the conduct of human affairs. It is, in other words, the failure to use ordinary care under the circumstances in the management of one's person or property, or of agencies under one's control.

HON. EDWARD J. DEVITT ET AL., 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS: CIVIL § 80.03, at 133-34 (1987). "Ordinary care," in turn, is defined as "that care which reasonably prudent persons exercise in the management of their own affairs, in order to avoid injury to themselves or their property, or the persons or property of others." *Id.* § 80.04, at 135. The instruction on contributory negligence similarly refers to the plaintiff's failure to use ordinary care. *Id.* § 80.22, at 178. For the instructions in *Butler, see supra* note 28.

Appellate opinions elaborate on the standard instruction's extremely abstract definition of reasonable care. For summaries of and variations on the "reasonable person" standard, *see, e.g.,* CALABRESI, *supra* note 3, at 22-23; KEETON ET AL., *supra* note 1, § 32, at 173-75; Fleming James, Jr., *The Qualities of the Reasonable Man in Negligence Cases,* 16 MO. L. REV. 1 (1951); M. Wells, *supra* note 3, at 732-33. For a feminist critique and reformulation of the standard, *see* Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort,* 38 J. LEGAL EDUC. 3, 20-36 (1988).

"person-situation" prototype of the reasonable person under the circumstances.[87] Because there is often no evidence of this (aside from evidence about custom[88]), the attorneys would be expected to evoke prototypes for the jurors. Next, jurors must determine what the plaintiff or the defendant actually did.[89] They must then decide whether there is sufficient "fit" between the conduct and the prototype to permit them to classify the party's behavior as "reasonable."[90]

We might expect counsel for both sides to evoke prototypes of the reasonable person and to characterize the evidence in ways that enhance the fit for the client and the divergence for the opposing party. The availability heuristic suggests some obvious applications. First, counsel would be expected to make available for the jurors a prototype of reasonableness that favors the client.[91] Jurors are likely

87. *See* Cantor et al., *supra* note 75. As discussed below, attorneys may also depict the parties in ways that fit general personality prototypes—*e.g.*, of the good or deserving (or bad or undeserving) plaintiff—to make it easier for jurors to commit the "fundamental attribution error" and assess fault or responsibility on the basis of the kind of person they think the plaintiff (or defendant) is. *See infra* notes 197-202 and accompanying text.

There may be systematic differences in what the "reasonable person" means as applied to different sorts of parties. For the proposition that jurors hold, and should hold, injurers to a higher standard of care than victims, *see* James, *supra* note 86, at 2 (arguing that relaxed standard for victims only better conforms to moral sense that actors should be held responsible in accordance with their subjective capabilities, but avoids increase in accidents and failure to compensate that relaxed standard for injurers would yield). James cites no empirical authority for his assertion that this double standard "probably prevails" in fact "because . . . juries, by and large, tend to resolve doubts . . . in favor of plaintiffs." *Id.*; *cf. Rossman v. La Grega,* 270 N.E.2d 313 (N.Y. 1971) (discussing double standard).

Research indicates that jurors hold corporations in general to higher standards of responsibility than they hold individuals. One justification jurors offer for this is that corporations can be expected to devote greater resources to acquiring information about safety and can develop and maintain relevant expertise. *See* Hans & Lofquist, *supra* note 9, at 102-04; *see also* Valerie P. Hans, Lay Reactions to Corporate Defendants (unpublished paper on file with author) (mock jurors hold corporations to higher levels of responsibility than individuals, but not because they regard corporations as "deep pockets").

88. *See* KEETON ET AL., *supra* note 1, § 33, at 193 (discussing how evidence of customary conduct of others in similar circumstances is normally relevant and admissible). Of the closing arguments studied in this Article, however, only the plaintiff's attorney in *Giulietti v. Providence & Worcester Co.,* Civ. Nos. 81-7453 & 81-7625 (D. Conn. 1981), *aff'd without opinion,* 688 F.2d 815 (2d Cir. 1982), relied on evidence of custom. *See also infra* note 191 (relationship between customary conduct and reasonableness).

89. In the cases analyzed in this Article, the central facts are mostly not in dispute. *Cf.* Moore, *supra* note 15 (exploring cognitive heuristics and cognitive filtering in fact-finding).

90. I do not mean to imply that jurors proceed sequentially through these steps. The process of "fitting" data to prototypes, involving as it does the use of several "shortcuts" or heuristics, is probably not linear. *See generally* CANTOR & KIHLSTROM, *supra* note 44, at 107-14 (discussing interpretive rules for social classification).

91. Thomas K. Srull & Robert S. Wyer, Jr., *The Role of Category Accessibility in the Interpretation of Information About Persons: Some Determinants and Implications,* 37 J.

to define reasonableness in terms of the way they like to think they would behave—an ideal, but based on their own experience as they perceive it.[92] Hence trial attorneys might be expected to construct prototypes by telling stories and making analogies that match the jurors' ideas of their own experience.[93] Second, because the process of classifying the case (or relevant part of it) as an instance of the prof-

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PERSONALITY & SOC. PSYCHOL. 1660 (1979) (observing, among other things, that the more a category for classifying social information is activated, the more likely the perceiver will use that category to classify new, ambiguous information); *see also* Green, *supra* note 15, at 249:

> Since judgment involves a comparison, implicitly or explicitly, between two or more stimuli, and since standards of comparison for judgments in negligence cases are likely to be indistinct, victory will reward the side that most effectively defines the situation for the jurors. Counsel would, therefore, be well advised to attempt to insinuate into the minds of the jurors a scale of precautionary standards which throws the best possible light on his client's case. The counsel for the plaintiff should convey in his argument a scale calibrated so that the precaution taken by the defendant will fall below the mid-point of the range. The counsel for the defendant, conversely, will seek to implant a scale the mid-point of which lies considerably below the point representing the care exercised by the defendant.

92. This point is, of course, recognized by practitioners. *See, e.g.*, 6 AM. JUR. TRIALS § 41 (1967) (suggesting that plaintiff's attorney encourage jury to define contributory negligence standard in terms of their own ordinary experience); response by attorney Steven Errante to author's inquiry (copy on file with author).

Research shows that "a large majority of the general public thinks that they are more intelligent, more fair-minded, less prejudiced, and more skilled behind the wheel of an automobile than the average person." GILOVICH, *supra* note 59, at 77. The last observation receives some confirmation from a major survey conducted by the Institute for Civil Justice, which indicates that 91% of people involved in two-car automobile accidents believe that the other driver was mostly at fault. DEBORAH R. HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 159 (1991). Thus, when jurors are led to refer to their conception of their own behavior to derive the standard of "ordinary care," they may be induced to define a higher standard of conduct than their actual behavior would warrant.

93. Response by attorney Dominick Esposito to author's inquiry (copy on file with author). Even when apparently not prompted by the attorneys, jurors during deliberations "frequently draw analogies or suggest parallel accounts that liken the situation in question, and jurors' interpretations of it, to more familiar, or better understood, events or circumstances." Holstein, *supra* note 15, at 98 n.17.

Another reason to tell stories or propose prototypes that tap into the jurors' preconceived notions is that persuasiveness decreases dramatically, regardless of the speaker's credibility, when the speaker advocates a position quite discrepant from the listener's. Linz & Penrod, *supra* note 20, at 34; *cf.* Donald E. Vinson, *Psychological Anchors: Influencing the Jury*, LITIG., Winter 1982, at 20, 22 (advocating use of "anchors" consonant with jurors' basic beliefs to orient their views on crucial issues).

Note that this tactic may cut the other way, or even be beyond the advocate's control. Hans & Lofquist, *supra* note 9, at 95-96, report that some jurors in tort cases voted for reduced awards for the plaintiffs, reasoning that they had been in similar situations to those the plaintiffs claimed were dangerous, yet had not themselves sued (*e.g.*, "if the job's dangerous, quit"); why should the plaintiff recover substantial damages?

fered prototype involves matching the salient features of the case (or part of it) to those of the prototype,[94] we should expect advocates to make more available, through repetition, vivid description, prominent placement, or otherwise, those features of the case that would yield a classification favorable to the client.

(2) Prototypes and Stories in the Arguments

(a) Argument Structure and Narrative

The arguments in *Butler* support the hypothesis that the lawyer for the party who would be disadvantaged by a straight rule-element analysis will argue the case in prototypical form. Both attorneys in *Butler* begin in traditional fashion,[95] by praising the jurors for their time and attention, thus securing the audience's good will by appealing to its worthy values and establishing the attorneys' own good character.[96] Both follow by emphasizing what they consider to be the strongest aspects of their respective cases, and both conclude by re-

94. *See supra* note 55 and accompanying text (prototype judgment and the representativeness heuristic).

95. This sort of introduction or *proem* is literally textbook technique, recommended, *e.g.*, in FRED LANE, LANE'S GOLDSTEIN TRIAL TECHNIQUE §§ 9.40-9.89 (3d ed. 1984); *see* CORBETT, *supra* note 20, at 309-10 (discussing use of introduction in classical rhetorical style to ingratiate oneself with the audience). Some more recent commentators, however, advise attorneys to avoid platitudinous introductions. *See, e.g.*, MARK A. DOMBROFF, DYNAMIC CLOSING ARGUMENTS 311-12 (1985) ("[S]tatements such as, 'Ladies and gentlemen of the jury, thank you for your attention' . . . are rather superficial statements which can be made . . . at any point during the body of the closing argument"; author nevertheless presents as exemplary an argument that begins by thanking jurors (*id.* at 904)); THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 287 (3d ed. 1992) ("[M]ost trial lawyers today avoid the traditional introductory comments . . . and get immediately to the argument."); TANFORD, TRIAL PROCESS, *supra* note 15, at 393 (stating that traditional introduction is "safe and inoffensive, but is also boring, insincere and misleading").

96. This is what Aristotle refers to as the *ethos*. Aristotle, *supra* note 30, bk. 1, ch. 2, at 1356. Butler's lawyer begins with a pathetic appeal: Butler "should be an inspiration for all of us" (B. 17.14-15). By identifying himself with the plaintiff (plaintiff's effort to answer questions is something that "I would like to aspire to" (B. 17.19-20); "I'm proud to represent him. I'm proud to know him" (B. 18.3)), and embracing the jury within the same sentiment (plaintiff's effort something "that we hope we all do" (B. 17.20)), the lawyer tries to secure the jury's good will in a triangle of identifications: lawyer with jury with plaintiff. *See infra* note 232 and accompanying text (same).

Revere's counsel begins his rather brief summation by identifying himself with jury: "[P]art of the privilege all of us have of living in this wonderful country is the right to vote and the right to sit on juries" (B. 31.2-4), and then segues into the jury's duty to decide properly (B. 31.5-6). This requires putting aside sympathy and speculation, and bringing in a fair, just, and impartial verdict based exclusively on testimony (B. 31.7-12, 31.16-18). Counsel establishes his own good character by acknowledging that Butler is "a fine and admirable person" who "deserves sympathy" (B. 31.15-16; *see also* B. 35.25-36.1).

minding the jurors of their task.[97] But Butler's attorney encourages prototypical thinking by emphasizing one feature of the case—the plaintiff's injuries—and by centering the argument on a story of the accident. In contrast, the structure of defense counsel's argument relies more on rule-element or verdict-category analysis.

After his introduction, Butler's lawyer describes his client's injuries.[98] This is by far the most extensive part of the argument (especially when counsel's advice regarding the calculation of damages is added in[99]), and it is prominently placed.[100] The rhetorical significance of this emphasis is all the more striking in light of the fact that the defendant, Revere, did not dispute any of the medical evidence.[101] The structure of this argument tells jurors that, come what may, this case is about a severely injured accident victim. George Butler's injuries engulf the individual elements of negligence.

Counsel for Revere, by contrast, organizes his argument between introduction and conclusion in rule-element fashion. First he recites the elements of a prima facie negligence case.[102] Then, instead of telling a story of his own, he analyzes the accident in terms that emphasize the plaintiff's lack of proof of the required elements. First, he explains that Revere owed no duty of care to Butler: it was the driver's duty, not the defendant's, to secure the load.[103] This is the longest portion of his summation. Second, he argues that there is no proof of causation.[104] Finally, he emphasizes issues over chronology by going back to the beginning of the incident and refuting the plaintiff's argument that the defendant "switched the job" on the plaintiff.[105]

97. Butler's lawyer concludes by appealing to the jury ("you hold his only chance" (B. 30.6)) and expressing confidence in their judgment (B. 30.22-23). Moreover, the lawyer's statement that he has "full confidence that you'll make your best effort" to determine damages (B. 30.21-23; emphasis added) echoes the terms in which he initially praises the plaintiff: Butler "tries to do the best he can with what he has left" (B. 17.16; emphasis added). Thus the lawyer again links the jurors with Butler.

Revere's counsel concludes by repeating his introduction: we're all sympathetic to the plaintiff, but the jurors' oath requires a verdict based on law, not sympathy (B. 35.25-36.9).

98. B. 18.6-23.22.

99. B. 27.25-30.5, 30.12-21.

100. For an analysis of the primacy effect in legal advocacy, reviewing relevant psychological literature, *see* Linz & Penrod, *supra* note 20, at 8-25.

101. B. 31.12-15.

102. B. 31.19-32.1. Counsel also repeats the elements later (B. 35.2-5).

103. B. 32.7-34.13.

104. B. 34.14-35.5.

105. B. 35.6-24. Butler's lawyer had argued that Butler had gone to work expecting to pick up a certain load, and that Revere changed the job after he arrived at Revere's plant.

Revere's counsel reinforces the rule-element pattern of thinking through metaphor. His major metaphoric theme is that the jurors' task is to *construct* a verdict. Just as the relevant legal rule is fixed, certain, and composed of all the elements counsel has discussed in order, a verdict is something fixed, stable, and measurable, to be built using certain discrete parts (evidence) and setting aside others (sympathy and speculation).[106]

Narrative is crucial to the arguments, especially that of Butler's lawyer. To persuade the jurors about causation and breach of duty, he tells a story that evokes a "normal" (and, by implication, accident-free) scenario for the loading and covering of the machinery, and emphasizes the conduct of Revere's employees, especially Brockway, as deviant, and hence presumptively at fault.[107]

See infra notes 170-71 and accompanying text (how Butler's attorney uses allegedly changed work order to argue causation).

106. Revere's attorney commands the jurors to "*set aside* all feelings of sympathy" (B. 31.8; *see also* B. 31.17), treating feelings as objects that can be "set aside" (on sympathy as object, *see also* B. 31.17-18: "the sympathy that all of us . . . *have*"). He also commands them to "*bring in* a verdict" (B. 31.9, 36.6), treating the verdict as an object. And the verdict to be brought in must be "*based* wholly and solely on the testimony" (B. 31.10-11, 36.7). All of these metaphors from the proem and the conclusion describe the verdict as an *object*—a well-supported object. Like a well-constructed building, the verdict must be "based" on a firm foundation of testimony; "feelings of sympathy" are not part of that foundation and must be "set aside." Note also how the verdict as a stable, well-constructed building contrasts with Butler's lawyer's primary metaphoric image, the *journey* (*see infra* notes 218-23 and accompanying text): something fluid, not stable and fixed. Thus Revere's attorney takes all of his opponent's rhetoric about the sort of person Butler is, wraps it all up as "feelings of sympathy," and tells the jurors to put it aside.

Revere's attorney even uses a metaphor to flag the contrast between what he is asking jurors to do and what Butler's lawyer is asking them to do: our sympathy "cannot *translate* into a jury verdict awarding money damages" (B. 36.2-3). *Translation* is fluid and two-directional, in contrast to *building,* which deals with "concrete" facts; translation deals with mere words, not objects like (metaphorically speaking) verdicts. The *building* metaphor, added to the images of measurement and quantity Revere's attorney uses to discuss his or the jurors' efforts to understand the case (summarizing the evidence on duty, he says "I tried to *reduce* [the evidence] to something that I could understand" (B. 33.20); introducing his analogy on the same point, he says, "Let's *bring it down* to something that all of us are familiar with" (B. 33.22-23); and concluding the story, he says, "[T]hat, on a *larger scale,* is exactly what the situation was in this case" (B. 34.12-13)), yields the metaphoric theme: jurors' task as architects or *builders of a fixed, stable, quantifiable verdict.*

All of these metaphors are clichés, of course, so much so that we may barely notice them as metaphors. All the more reason, then, that they may reflect an intuitive pattern of imagining the decision-making process.

107. *See supra* notes 82-83 and accompanying text (understanding causal connections in stories).

Jurors cannot be expected to be familiar with how machinery like this is usually loaded onto trucks like Butler's.[108] Yet Butler's attorney does not build his normal scenario using evidence of the custom of the workplace.[109] Rather, he implies a customary scenario by the way he describes what happened. Recall the story. It amounts to this: George Butler tries to do the job he's told to do, and struggles to put the tarp on the machinery; Brockway and his men, having loaded the machinery and now seeing Butler struggle, go on their coffee break instead of helping. The implicit normal scenario is: working people are supposed to do their jobs; one who begins to help someone else with a difficult physical job at the workplace continues to help until the job is done, if he can do so without significant inconvenience to himself.[110] That's

108. Hence, in Schank and Abelson's terms, jurors lack a script for the loading and tarping of machinery. This activity is not so familiar to them that they would carry around a highly articulated understanding of how it usually goes, the way the "restaurant script" structures their knowledge of what goes on in restaurants. Schank and Abelson posit that, in situations for which we lack specific scripts, we make sense of stories by drawing on more general knowledge of actors' goals, their "plans," or typical goal-oriented sequences of behavior, and the "expectancy rules" that shape goals. SCHANK & ABELSON, *supra* note 46, at 69-130. The "normal scenario" for loading and tarping suggested in the text may be thought of as a narrativized expectancy rule governing workplace conduct. *Cf. infra* note 110 (Butler's attorney's argument may be understood in terms of implicit contract rule of reciprocity).

109. The trial record does not specify whether loads like Butler's were usually tarped or not. Robert Brown, Butler's manager and supervisor, testified that loads picked up at Revere were sometimes tarped, sometimes not (B. 30.14-23 (transcript of proceedings of Apr. 24, 1990)). The record also does not specify whether Revere employees typically helped drivers like Butler put tarpaulins on their loads. Brockway testified that it was not his personal responsibility to help with the tarping (B. 68.25-69.5, 78.24-79.2 (Apr. 24, 1990)), but this does not establish whether he or others actually did so on other occasions. Another Revere employee, Jerry Stedman, testified that he had no knowledge of Revere employees helping drivers tarp their loads (B. 108.10-17 (Apr. 24, 1990)). A third Revere employee, Jerry Wall, testified that drivers pulled their own tarps on "all the time," but that "someone in the area" might help if asked (B. 29.6-9 (Apr.24 1990)). Butler didn't ask.

110. Another implicit normal scenario that may apply derives from the contract norm of reciprocity described by Ian Macneil, *Values in Contract: Internal and External,* 78 NW. L. REV. 340, 347-49, 374-75 (1983). This norm is "the principle of getting something back for something given." *Id.* at 347. It could apply to *Butler* because there was a contract between Revere and Schultz Electric, Butler's employer, even though it did not, of course, prevent Butler from suing in negligence for personal injuries. According to the norm of reciprocity, if Butler was asked to do something different from what was agreed to under the contract (*e.g.,* load other equipment or put a tarp on the load; *see supra* text accompanying note 26 (Butler's attorney pointing out changes in work order)), his doing it amounts to a favor to or accommodation of Revere; Revere's employees then owe a reciprocal duty to help him, even if that, too, is outside the contract terms (*i.e.,* under the contract they are not responsible for helping the driver put a tarp on the load). In this respect, a finding that Revere's employees breached a duty to make a reasonable effort to help Butler is consistent with an implicit rule of contract law. (I owe this observation to Sandy Meiklejohn.) For the notion that reciprocity may represent a more general norm of social ordering, *see* ROB-

the way things ought to happen. Butler behaves according to this scenario. We can understand why he would undertake the difficult tarping job alone—he always gives his best—but we can also understand that normally, Revere's employees would help him. Brockway's conduct, on the other hand, deviates from the normal story. Indeed, the coffee break is a prototypical image for not working at the workplace. Butler's lawyer expects jurors to link the deviations from the normal—the failure to help and Butler's fall—and thus to hold Revere responsible for the accident.[111]

Butler's attorney uses narrative to assign responsibility, but he also offers jurors hooks to attach their judgment to doctrine. Causation opens the narrative—"On January 20, 1986, his life changed and it didn't have to be changed that way"—and both breach of duty and causation conclude it: "it's that kind of carelessness that resulted in this injury." The elements of negligence are integrated into the attorney's conception of the case, but they do not govern it.[112]

ERT C. ELLICKSON, ORDER WITHOUT LAW 164-66, 225-29 (1991) (discussing "tit-for-tat" and similar strategies of reciprocity as welfare-maximizing solutions to versions of Prisoner's Dilemma game).

For a discussion of an implicit "social contract" underlying mock jurors' assessments of responsibility for accidents, *see* Tetlock, *supra* note 49, at 361-62. Tetlock discusses experiments in which subjects awarded greater compensation when the harm resulted from a failure of the expected routine (*see infra* note 150). He contends that these subjects, rather than being guided by a cognitive "bias" such as that described by simulation or norm theory (*see infra* notes 141-54 and accompanying text), were

> trying to restore the original social contract between the victim and perpetrator. That contract specified that, in return for paying the fare, the owners of the train would transport the passengers to point X and would do so as safely as current technology and nature permit. When either the engineer or electromechanical device fails to do the assigned job, that contract has been violated.

Thus, in *Revere,* Butler's agreement to do something not required under the contract created an implicit social contract under which Revere's employees were to help Butler with the task. By not helping him, they violated that contract.

111. Whether jurors will accept the "normal scenario" Butler's attorney implies, and hence will make the judgments that conformance to or divergence from that norm suggest, depends on many factors, including their personal experiences and values. Someone who regards the workplace norm as not doing anything beyond the absolute minimum required to keep one's job, including not proceeding in the face of risk unless specifically ordered to do so, might find Butler's conduct less explicable and Brockway's more justifiable. *Cf.* BENNETT & FELDMAN, *supra* note 76, at 66-90 (finding credibility of story inversely correlated with number of ambiguities and gaps at crucial junctures in story; ambiguities and gaps are defined in relation to background expectations about how stories ought to proceed).

112. Butler's attorney also tells several "mini-stories," some no more than a transcript line or two in length, designed to convey to the jurors the severity of his client's injuries and suffering and the appropriate measure of damages. *E.g.,* B. 20.16-20, 21.20, 21.24-25, 22.2-4, 23.1-3, 28.14-17, 29.15-20.

Revere's attorney tells but a single, brief story. The story is not about the accident itself; rather, it is an analogy intended to counter Butler's attorney's narrative of normality and deviance. The analogy seeks to reconcile Brockway's behavior with social norms. It does this by trying to persuade the jurors that Revere owed no duty to Butler to secure the load.[113] Revere's lawyer asks each juror to imagine that a repairman needs to take a heavy piece of equipment, a refrigerator-freezer, from the juror's home to the shop. The homeowner might help the repairman put the equipment on the truck, and then walk away. The lawyer then rhetorically asks the jurors if they should be held liable if the repairman, while the truck is still parked in the driveway, falls for an unknown reason and is injured. "Certainly not. It would be ridiculous."[114] If jurors apply this prototypical scenario of reasonable behavior to Brockway, they should conclude that failing to help the struggling Butler is not, under the circumstances, deviant or blameworthy; Brockway simply had no obligation to help.

A different pattern of argument structures and narratives may be found in the summations in *Giulietti v. Providence & Worcester Co.*[115] John Giulietti, a young railroad worker, was trying to hook up cars in a rail yard. He was crushed to death when the rear of the car on which he was riding backed over an incorrectly aligned cross-over switch and into a line of cars sitting on another track. The plaintiff's lawyer charged that the railroad was negligent in many respects: it did not properly train John Giulietti to be a conductor, yet compelled him to conduct a crew at night in an unfamiliar yard; Giulietti's fellow and senior crew member, Ed Hines, planned an unnecessarily dangerous hitching maneuver and did not comply with railroad rules when backing the train up; and the railroad yard lacked various safety devices, in particular a flag marking the crucial cross-over switch. The railroad's attorney countered that Giulietti's own carelessness—in allowing the train to back up too quickly and not looking where he was going—caused his death.

113. B. 33.22-34.13 (*see supra* note 29 for full text of this analogy).

114. B. 34.12.

115. *Giulietti, supra* note 88. The administrator of John Giulietti's estate sued the railroad under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* In FELA cases, the plaintiff must prove both that the defendant railroad was negligent and that the railroad's negligence was the sole proximate cause of the plaintiff's injuries (or the decedent's death). The plaintiff's burden of proof on causation, however, is "low and liberal": the defendant railroad should be found liable if its negligence "played any part, even the slightest" in contributing to the plaintiff's injury. *Smith v. National R.R. Passenger Corp.*, 856 F.2d 467, 469 (2d Cir. 1988) (citations omitted). Any award to the plaintiff must be reduced by the percentage the plaintiff's (decedent's) contributory negligence contributed to the harm.

While the arguments in *Giulietti* differ from each other in significant respects, both consist, very broadly, of rule-element presentations.[116] Giulietti's lawyer does tell a story about the accident, but it is explicitly subordinated to a rule-oriented argument about the defendant railroad's fault and causal responsibility. The narrative first focuses on the claim that the defendant was negligent because Giulietti was not qualified to be a conductor on that crew that night,[117] and

116. Both counsel, on the surface, appear to employ some of the received wisdom on forensic technique. *See supra* note 95 (traditional principles of closing argument rhetoric). Each begins with the proem, in which they praise the jurors for their time and attention, thus securing the audience's good will by appealing to the audience's worthy values (*see* G. 487.2-4 (Giulietti's attorney); G. 508.24-509.1 (railroad's attorney); the railroad's attorney also praises the jurors by describing them as people of "common sense" (G. 509.21-510.3)) and establishing a sympathetic, favorable ethos (the railroad's attorney establishes a sympathetic relationship with the jury, adverting to his absence the previous week, delaying the trial (G. 509.4), and pointing out that the case is "very difficult for a defense lawyer" (G. 509.6)). Each then summarizes testimony (*see* G. 487.11-495.15, 504.13-506.11 (Giulietti's attorney); G. 512.21-517.1 (railroad's attorney)). Each attorney proceeds to the argument, identifying issues and presenting contentions on each issue (*see* G. 495.16-504.8 (Giulietti's attorney); G. 510.11-524.25 (railroad's attorney)). Each then concludes by stressing his most important point: for Giulietti's attorney, the thinly veiled appeal to sympathy, in the name of justice (G. 508.7-16); for the railroad's attorney, John Giulietti's negligence and its consequence for the verdict (G. 525.21-526.10).

To be sure, neither attorney systematically identifies and discusses all important issues. Leading writers on closing argument technique encourage advocates to discuss all issues. *See, e.g.*, TANFORD, TRIAL PROCESS, *supra* note 15, at 392-99; *see also id.* at 401 for a second recommended organizational pattern. Counsel for John Giulietti's estate does not even mention the decedent's conduct.

117. G. 487.7-495.15. Some excerpts from this argument follow:

> I think what I told you in my opening statement, although how brief it was and sketchy it was, I believe that the evidence has borne up all the claims of negligence that we made from the beginning. As you will recall the testimony from Train Master David Fitzgerald, who was the one who was responsible for qualifying John [Giulietti] as a Conductor, was that he was not sure whether or not John was qualified as a Conductor. It is a rather unusual approach to qualifying men as a Conductor, when you think how the other railroads take great care and pains and make sure that a man meets a standard. The standard is that he is not only qualified on the book of rules, but familiar with the physical characteristics wherever he is sent out to work. To be familiar with the physical characteristics, you must know where the switches are, curves in the track, how many tracks there are.
>
> . . . .
>
> Well, this crew was called by Train Master Fitzgerald and they were assigned to go down to a place called Midway. Through Train Master Fitzgerald's own testimony, he said John didn't meet the qualifications to be a conductor at Midway, which is located on Amtrak property. He took the Amtrak book of rules like he took the [defendant Providence & Worcester's] book of rules, but he did not qualify on the physical characteristics of Amtrak, where the switches are and tracks are. For that reason he was not even qualified as a Conductor to work on Amtrak property at a place called Midway.

then divides into nine segments, each corresponding to a reason for finding the defendant negligent.[118] Giulietti's attorney does not relate

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Now, Train Master Fitzgerald put together his crew and he sent them out at night into the dark for some on-the-job training. No one will deny that on-the-job training is essential to training a Conductor, but it is our contention that you don't throw men out to learn for themselves in the middle of the night. . . .

Well, Johnny was sent out that night and he was working in the capacity of a Conductor. [Counsel then discusses conflicting evidence concerning Giulietti's prior experience at the Norwich Yard, where the accident occurred.]

. . . .

. . . [E]ven if everything that [one witness] has to say [concerning Giulietti's experience] is true and that what [a second witness] said, which is borne out by the records, is incorrect, one night that [Giulietti] could have been in Norwich Yard at night would not qualify him on the physical characteristics of Norwich Yard. . . .

. . . No records indicate [Giulietti] was qualified as a Conductor and, in fact, the General Train Master doesn't even recall whether or not he was qualified as a Conductor. He was a third body to be put on this train crew, and that's all the Train Master was concerned with at the time.

. . . Now, the train proceeded north and was going by Norwich Yard or just the beginning of it where a place called King Seeley was [where the car to be hitched up was located]. Both Eddy Hines and Danny Crawford [the brakeman on the crew] testified that Eddy had to show Johnny where King Seeley even was. He had no idea where King Seeley was . . . . So Johnny had no idea what this Norwich Yard looked like. . . .

G. 487.7-24, 488.9-489.3, 489.15-491.17, 492.10-15, 492.20-493.1, 493.7-8.

118. G. 495.16-504.8. Excerpts from each component of this argument follow:

(1) The first reason why we claim that Johnny is gone now through the negligence of the railroad is the fact that the railroad never bothered to train Johnny on the physical characteristics of the Norwich Yard. They never brought him down. . . .

. . . .

Now, it is our belief that the railroad has an obligation to Johnny Giulietti and to Brakemen that before they work as a Conductor on any property where they have never been before, to instruct them as to the physical characteristics of where they are about to go so that they know where the switches are and they know the curves of the track and how many tracks there are. If you are familiar with the characteristics of a yard, well, then when you perch on top of a boxcar looking for switches, you will have an idea of what you are looking for.

G. 495.25-496.4, 496.24-497.10.

(2) The second claim of negligence is the fact that Eddy [Hines] observed this switch being in a reversed position. He knew that the switching move that they were going to perform that night had to transverse [sic] that switch. . . . I think a reasonably prudent person would have told his crew members, "Be careful of the cross-over switch, it is reversed." For some reason, Eddy decided that Johnny's a big boy and Johnny will find it himself. So he never told Johnny.

G. 497.11-15, 497.18-22.

(3) The third claim of negligence is the fact that the move that Eddy suggested was to bring this whole train of eleven cars onto track three [in order to hitch up with the cars at King Seeley]. Well, it is my claim that a reasonably prudent Conductor in that situation would have taken the engine without any cars and tied onto the two cars and would have been able to more safely handle his

train . . . . The fact is, if you have two cars, you can stop a two-car train a lot quicker than an eleven-car train, especially when you are going someplace where a man is supposed to be a Conductor and is supposed to know the physical characteristics and doesn't know where he is going.

G. 497.23-498.5, 498.11-16.

(4) Now, we also claim that there was negligence when Johnny radioed Eddy Hines, "Okay to back up." We believe that Eddy never should have moved the train. Other railroads . . . would not permit the Engineer to move the train. General Train Master David Fitzgerald testified that he should not have moved the train. . . . The instructions, "Okay to back up" in railroad meaning is not the complete radio instruction, because you don't know where you are going or how far you have to back up. The question is, why didn't Johnny tell Ed how far he was going to back up? The obvious reason is, which Eddy very well knew, is that Johnny didn't know where he was going.

G. 498.17-24, 499.2-9.

(5) Another act of negligence on the part of an agent of the railroad, being Engineer Hines, is that he should have at some point inquired, "Johnny, where are you going? What are you doing, Johnny? Do you know about that reversed cross-over switch?" But there is no inquiry. If Eddy knew that switch was reversed, then under his rules he is supposed to stop one-half the distance to that cross-over switch. He never stopped and continued to shove his train.

G.499.17-500.2.

(6) As he continued to shove the train, Danny Crawford testified that he heard at least a couple of seconds of scratching or scraping noise being transmitted over the radio. Ed Hines testified that he heard these scratching and scraping noises being transmitted and he immediately put the independent brake on the locomotive . . . .

. . . There are two brakes on the locomotive. One brake is your emergency brake. When you have a problem, you put the train into emergency, and . . . every single brake on that train is applied on every one of the eleven cars and two locomotives. This was not done. When Eddy heard the scratching and scraping noise . . . , he put the independent brake on, and the independent brake does nothing. All that does is put the brakes on the two locomotives and those cars, eleven cars, will continue to go in a southerly direction . . . .

It is our belief that Eddy should have put the train into emergency. . . .

G. 500.3-9, 500.20-501.5, 501.8-9.

(7) Now, we also believe that when you [are] perched on top of a rail car and are looking to see if there is a switch ahead of you . . . . [i]t is our belief that . . . it is prudent for a railroad to have a light, one light, which would indicate where the switches are. When you look at the exhibits . . . you will note that the switches are black and the background is a big black rock behind the two switches. It is something very difficult to ascertain in the middle of the night when you have a lantern that . . . you would be able to see, I believe it was, twenty-five feet in front of you. If you are on top of a boxcar ten or fifteen feet high, it is even more difficult . . . . If you had some lights there, that would benefit the switching crew, because they would be able to see the area and would not be in the dark of night.

G. 501.20-22, 502.9-22, 502.24-503.2.

(8) Also, we believe that the Providence & Worcester Railroad should have a standard rule that is on all other railroads . . . . This rule is that when you have a cross-over switch, that cross-over switch has to always be lined straight and you put a padlock on this cross-over switch to make sure that no one is going to throw it or let anything happen.

a gripping, concrete story of the fatal evening until pressed for time by the judge's interruption, at which point he can spend only two transcript pages on it before the judge cuts him off again to urge him on to his discussion of damages.[119] The railroad's counsel, on the other hand, does not tell any sustained story about the accident. He argues the issues of duty, breach, and causation, dwelling almost entirely on Giulietti's responsibility and not his client's.

Thus, each lawyer in *Giulietti* explicitly argues a rule-element version of the case, mentioning damages briefly at the end.[120] Prototype theory does not help to explain these argument structures. Instead, each attorney organizes his argument to inculpate the other party, ap-

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G. 503.3-11.

> (9) In addition, it is a practice on other railroads that they do have targets. . . . Now, a target is a reflective, metal sign on the top of the switch. If you have a lantern and you are traveling on the back of a boxcar at night, that reflective target is going to pick up the light from your lantern and you are going to know, first of all, that there is a switch there and, second of all, you are going to know the position of that switch . . . . We submit [this] should have been a practice in the Providence & Worcester Railroad.

G. 503.14-504.3.

119. Now, what happened on July 28, 1980, was that John was perched on top of the lead car trying to ascertain a position of the switch, which he never even knew existed. He has a lantern and we are not saying with a lantern you can't tell the position of the switch. Of course you can, but it is a difficult thing to do. You have to know where the switches are, and you have to know exactly where to point the lantern.

> When John was coming down that lead track, he knows that track one switch is going to be in front of him and he will put on the switch at the point of the track one switch, but what he did not expect was right behind that track one switch, there was a cross-over switch. John was on the side ladder . . . and he began to make this cross-over move towards the main line. The clearance between his car as it was on track one and the cars on the main line is very close. He does not have room to ride between the cars. . . . Once you begin that cross-over move, that gap begins to narrow on you.
>
> If you look at the autopsy report, it will clearly show that John died from a crush injury of his lower abdomen and chest, but also will indicate that as far as his lower extremities were concerned, that he had a compound fracture and dislocation of his left ankle.
>
> . . . When the car that he was riding . . . side-scraped the car ahead, he was actually crushed into the—he side-scraped it for about thirty feet, and this is possibly what they heard with the transmission of scraping and scratching noise. As John was trying to cross over, he had to know that his life was over, unless Ed, hearing the scratching and scraping noise on the radio, applied the emergency brake and stopped the train instantly. He scraped that car for approximately thirty feet . . . .

G. 504.11-506.6.

120. G. 506.17-508.5 (Giulietti's attorney); G. 523.9-524.19 (railroad's attorney).

parently believing that the evidence of the other's carelessness was strong enough to warrant a rule-element approach.[121]

(b) The Prototypical Reasonable Person

The railroad's lawyer in *Giulietti* uses analogies and metaphors to build person-situation prototypes of reasonable behavior under the circumstances, and contrasts to them Giulietti's actual conduct on the night of the accident.[122] The analogies are designed to appeal to the jurors' common experience. To help make the somewhat difficult argument that if Giulietti wasn't capable of acting as conductor, he was careless to accept the job and its attendant risks, counsel for the railroad argues: "You people in your daily lives, if you go somewhere and someone says, well, what are we going to do tonight and says we will do this, if you don't think you are capable of doing it, you don't do it. If you do it, then I submit you would be negligent."[123] Along the same lines, the lawyer tries to persuade the jury to infer from Giulietti's lack of familiarity with the yard, not that the railroad was negligent in assigning an inexperienced man to conduct the crew at night, but rather that Giulietti himself should have used greater caution in conducting the crew. The lawyer explains:

> We talk about driving a car, and maybe it is not a fair analogy to say, but we will say in driving a car, for instance, . . . there are intersections that have lights and stop lights and there are intersections that have neither. Our caution is different at different intersections and is governed by what our experience is as drivers. That doesn't mean we have to qualify in physical characteristics every time we go to a strange place, but we have to exercise more caution. If we don't know where we are going, we have to stop and ask directions.[124]

While we might expect prototypes of reasonable behavior to take analogic form,[125] not every analogy is effective. The railroad's lawyer's analogies are flawed in two ways. First, neither seems obviously apt, as a good analogy must be. For instance, some jurors may imagine that

121. Other heuristics, however, may be relevant; *e.g.*, the fundamental attribution error (*see infra* notes 182-257 and accompanying text) (by focusing so disproportionately on the other party's conduct, each attorney makes the other party's behavior more salient, and thus a more likely candidate for the cause of the accident).

122. In *Butler,* the most important prototypical construction is implicit. It is discussed *infra* notes 218-30 and accompanying text.

123. G. 515.8-13.

124. G. 517.13-25. According to the leading torts treatise, this should have been a promising argument, because "[a] person may be found negligent in proceeding in the face of known ignorance." KEETON ET AL., *supra* note 1, § 32, at 185.

125. *See supra* note 88 and accompanying text (analogies or other constructions are needed to depict model or standard of reasonableness in absence of evidence of custom).

conducting a train is like driving—but with one person on the floor controlling the brakes and the gas pedal, another steering blindfolded, and a third on the roof giving directions.[126] And second, the analogy of "declining to participate in an activity the jurors feel incapable of doing" is too abstract: it is not drawn at the more concrete "basic level" at which prototypes are most accessible.[127]

The railroad's lawyer also uses metaphor to invoke a prototypical reasonable person, and simultaneously argues that the jurors themselves fit the prototype but that Giulietti did not, and therefore acted unreasonably. To make this argument, the attorney characterizes the jurors as "people of common sense,"[128] and seeks to distinguish the exercise of common sense from "20/20 hindsight" and "after-the-fact guesswork" about what someone should have known or should have done.[129] The attorney's aim is to both persuade the jurors not to engage in "after-the-fact guesswork" when they evaluate how his client, the railroad, behaved, yet to encourage them to evaluate John Giulietti's conduct "after the fact" and find that it was careless. This effort to distinguish the jurors' evaluation of Giulietti's conduct from their evaluation of the railroad's conduct depends on a metaphoric depiction of the person who uses common sense, which the jurors fit but which Giulietti does not.

126. I owe this observation to the students in my jurisprudence course, fall 1993 (notes on file with author). The relevance of the first analogy would also be limited for any juror who thought that Giulietti, as a junior employee of the railroad, was constrained to follow orders in a way that the juror, in selecting among possible leisure-time activities, would not be. By analogy to Bennett and Feldman's studies of the credibility of stories (*see supra* note 76 and accompanying text), jurors may find these analogies implausible because they do not conform unproblematically to jurors' background knowledge of how the "conducting a train" and "following orders at work" stories ought to proceed.

127. *See* LAKOFF, *supra* note 14, at 31-42, 46-54 (discussing work of Rosch and others); Cantor et al., *supra* note 75, at 56.

The analogies may also fail to persuade as arguments about causation. *See infra* notes 141-54 and accompanying text (simulation heuristic generally). First, the behavior of John Giulietti that the driving simulation targets is a generalized lack of caution or attention to his work, not the sort of specific antecedent of the accident with respect to which the simulation heuristic seems most likely to work. Second, the driving simulation alone might be unlikely to persuade jurors that Giulietti's behavior was a sufficient condition for the accident, in the face of so many other allegedly careless acts by the railroad and its other employees that intervened between Giulietti's generalized lack of caution and the moment of impact. *See* H.L.A. HART & TONY HONORE, CAUSATION IN THE LAW 41-44 (2d ed. 1985) (arguing that intervening volitional acts break causal chain).

128. G. 509.22-25 (a metaphor that builds on the common metaphor *understanding is seeing* and, by extension, a perceptual sense).

129. G. 510.1-2, 514.21-22.

First, the lawyer argues that when Giulietti was riding the train that night, he "wasn't paying attention" to where he was going.[130] This figure of speech understands thought as an object, and more particularly, as currency. *Attention* is something that can be *paid.*[131]

Next, the attorney explains that Giulietti's failure to pay attention to what he was doing is "the bottom line of what this case is."[132] Here the attorney metaphorically asks the jurors to think of the case as being like a balance sheet, with one feature—the *bottom line*—more important than any other. Again, the attorney uses a fiscal metaphor; perhaps he thinks that people of "common sense" (*i.e.,* the jurors) can understand a balance sheet, or at least imagine that they can balance a checkbook.[133] And again, the jurors, who use common sense, are distinguished from the plaintiff, who did not.

Finally, the railroad's lawyer argues: "If [Giulietti], . . . by not paying attention caused his death, then everything washes, ladies and gentlemen."[134] The metaphor here, once again, is complicated trial as simple financial transaction. While the popular understanding of "it's a wash" may not include the technical, financial meaning of the term,[135] the phrase is widely understood to mean a balanced exchange: "it's a wash" means one thing cancels out the other. The lawyer thus concludes by telling the jurors that if they give due weight to Giulietti's inattention, their understanding of the lengthy trial and complicated evidence will be balanced. More importantly, the trial and the jurors' understanding of it will be complete, with no loose ends ("everything washes"): Giulietti's negligence caused his own death. The lawyer has used a sustained set of fiscal metaphors to distinguish the jury's task in evaluating Giulietti from its task in evaluating the railroad and its other employees: the latter involves

130. G. 516.13, 518.6-7, 520.9, 522.5, 522.22, 525.11.

131. *Cf.* GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 47-48 (1981) (ideas can be *objects, resources, commodities,* or *money*).

132. G. 520.8-10; *see also* G. 517.2.

133. The use of an "economic man" prototype is also suggested, and thus perhaps made both more salient and plausible, by the standard jury instruction on "ordinary care," which refers to how a person of reasonable prudence would manage his or her own property. *See supra* note 86 (negligence instructions).

It may also be that defense counsel's stress on the "bottom line" is a way of telling the jurors: This case is really just about money, and if you're tempted to find the railroad negligent, don't forget that Giulietti was also negligent and that his negligence should reduce his estate's recovery. (I owe this observation to Neil Rogan, a student in my Jurisprudence course, spring 1993; notes on file with author.)

134. G. 525.10-12.

135. *See* JERRY M. ROSENBERG, DICTIONARY OF BUSINESS AND MANAGEMENT 471 (1978); WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1130 (1984).

"guesswork" or "judgment calls" that can go either way, but the former is a straightforward, simple matter of the "bottom line."[136]

For at least two reasons, this metaphoric construction of the desired prototype of reasonableness may not be persuasive.[137] First, the lawyer may be drawing the prototype too abstractly.[138] Second, the cues for the prototype are relatively obscure. Research indicates that the accessibility of a schema for making social judgments (like how to evaluate a party to a lawsuit) increases with the number of behavioral concepts relating to that schema that have been activated, but decreases with the length of time between activation and judgment.[139] By failing to activate the schema early, late, and often, the lawyer may not adequately "prime" the jurors to use his "economic man" prototype.

D. The Simulation Heuristic: Identifying the Cause of the Accident

The law typically instructs jurors to identify as the cause of an accident a prior event that was a "substantial factor" in bringing about the accident.[140] Cognitive psychology indicates that jurors are likely to choose as the cause the prior event they perceive as most surprising or deviant, the one that they most readily think "could have been otherwise." We will examine lawyers' rhetoric to see how, by making salient any arguably deviant conduct of the other party, they encourage jurors to use their common sense causal attributions to fill in the very broad and vague legal definition of causation.

136. Of course, the metaphor "everything washes" is ambiguous; the source could be not financial affairs, but liquids. The railroad's lawyer might be suggesting that the jurors, by understanding that Giulietti's negligence caused his own death, can award the plaintiff nothing and still feel clean, as if they have "washed their hands" of the trial. (This also neatly responds to Giulietti's attorney's liquid metaphor for justice—the "full cup of justice"—and to his reference to "look[ing] anyone in the eye" as a metaphor for being satisfied with their decision.)

137. Reactions from students who have examined the two transcripts confirm my impression that the *Giulietti* defense counsel's metaphoric construction of the "economic man" is far less successful than the *Butler* plaintiff's counsel's metaphoric construction of his client as Rocky Balboa (notes on file with author). *Cf. infra* notes 218-30 and accompanying text.

138. *See supra* note 127 and accompanying text (prototypes most accessible at "basic level").

139. Srull & Wyer, *supra* note 91.

140. For the substantial factor definition of cause-in-fact, *see* KEETON ET AL., *supra* note 1, § 41, at 267-68. In Connecticut law, the substantial factor test has been adopted to define the proximate cause component of legal causation. *See Doe v. Manheimer,* 563 A.2d 699, 703-04 (Conn. 1989); *Mahoney v. Beatman,* 147 A. 762, 766-67 (Conn. 1929); DOUGLASS B. WRIGHT ET AL., CONNECTICUT LAW OF TORTS, § 32, at 56-57 (3d ed. 1991).

(1) Causal Attribution as Counterfactual Analysis

Attribution theory offers explanations of how people determine the causes of events.[141] Research indicates that the analysis of causation is always implicitly, if not explicitly, counterfactual. All leading models of causal attribution give answers to variations on the question: Why did this event occur rather than that? And because explanations ordinarily are sought only when what happens is contrary to expectations or to the normal state of affairs, causal analysis can be understood to answer the question: Why did this event occur rather than the normal one?[142] Thus, the question of causation in the accident case involves a comparison between what actually happened and a contrasting, "normal" case in which the result to be explained—the accident—did not occur.

When jurors decide a negligence case, how do they formulate the hypothetical, counterfactual scenario with which they will compare what actually happened? The simulation heuristic, an instance of the availability heuristic, is particularly relevant to this task. Using the simulation heuristic, people who must identify the cause(s) of some outcome construct scenarios other than the one that actually occurred by "undoing" one or more of the events that preceded the outcome. They imagine: "If only x had been different, the outcome would have been different." The more readily they can construct an alternative

141. *See generally* FISKE & TAYLOR, *supra* note 40, at 22-95; NISBETT & ROSS, *supra* note 13, at 30-32, 120-26; Lee Ross & Craig A. Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments, in* JUDGMENT UNDER UNCERTAINTY, *supra* note 38, at 129 (discussing how attribution biases cloud attempts to predict, control, and understand events). Attribution theory also studies assignments of responsibility. For distinctions and sometimes confusions between attributions of causation and attributions of responsibility, *see infra* note 193. For a brief and very general application of attribution theory to closing arguments, *see* Donald E. Vinson & Philip K. Anthony, *The Closing Argument: Applications of Attribution Theory,* 7 TRIAL DIPL. J., Spring 1984, at 33 (1984) (explaining importance of offering jurors causal explanations of events, including mention of internal versus external attributions (related to fundamental attribution error; *see infra* notes 182-88 and accompanying text); apparently misconstruing role of "consensus" information (*cf. infra* note 192)).

142. Denis J. Hilton, *Conversational Processes and Causal Explanation,* 107 PSYCHOL. BULL. 65, 70-71 (1990); Denis J. Hilton & Ben R. Slugoski, *Knowledge-Based Causal Attribution: The Abnormal Conditions Focus Model,* 93 PSYCHOL. REV. 75 (1986); *see also* FISKE & TAYLOR, *supra* note 40, at 63-66; Lloyd-Bostock, *The Ordinary Man, supra* note 15, at 146-47 (how causal attributions called for by events that are puzzling or violate a norm). Hilton explains that causal explanations are sought against a background of what is already known, which includes the presumed "ordinary" state of affairs. Hilton, *supra,* at 66; *see generally* CONTEMPORARY SCIENCE AND NATURAL EXPLANATION 5-6, 11-93 (Denis J. Hilton ed., 1988) [hereinafter CONTEMPORARY SCIENCE] (collection of essays developing various aspects of the contrastive view of causal explanation).

scenario (*i.e.*, the easier it is to imagine a particular change in the events preceding the outcome), the more probable they judge that alternative, and the more likely they are to think that the actual outcome need not have occurred and should have been avoided.[143] The cause of the actual event is the prior occurrence that is changed in the alternative story. "A cause must be an event that could easily have been otherwise."[144]

In an early experiment, some subjects read a story about a man who left his office at the usual time but drove home by an unusual route; other subjects read a version in which he left early but took the usual route. In both stories, the man braked hard to stop at a yellow light, although he could easily have gone through. When the light changed, he started through the intersection, only to be rammed and instantly killed by a teenaged truck driver under the influence of drugs. Subjects who read the "unusual route" version most often responded that if only the man had taken his usual route, the accident would not have occurred. They did not tend to "undo" the stopping at the yellow light or the presence of the teenager. Subjects who read the

143. Daniel Kahneman & Amos Tversky, *The Simulation Heuristic, in* JUDGMENT UNDER UNCERTAINTY, *supra* note 38, at 201; Sherman & Corty, *supra* note 43, at 218-24. Simulation may be employed not only post hoc to make judgments of causation, but also ante hoc to make predictions or judge conditional probabilities. Kahneman & Tversky, *supra,* at 202, 206-08.

For more recent research confirming people's use of the simulation heuristic, *see, e.g.,* Daniel Kahneman & Dale T. Miller, *Norm Theory: Comparing Reality to Its Alternatives,* 93 PSYCHOL. REV. 136 (1986); C. Neil Macrae, *A Tale of Two Curries: Counterfactual Thinking and Accident-Related Judgments,* 18 PERSONALITY & SOC. PSYCHOL. BULL. 84 (1992); Dale T. Miller et al., *Counterfactual Thinking and Social Perception: Thinking About What Might Have Been,* in 23 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY 305 (Mark P. Zanna ed., 1990); Dale T. Miller & Cathy McFarland, *Counterfactual Thinking and Victim Compensation: A Test of Norm Theory,* 12 PERSONALITY & SOC. PSYCHOL. BULL. 513 (1986); Gary L. Wells et al., *The Undoing of Scenarios,* 53 J. PERSONALITY & SOC. PSYCHOL. 421 (1987); Gary L. Wells & Igor Gavanski, *Mental Simulation of Causality,* 56 J. PERSONALITY & SOC. PSYCHOL. 161 (1989); Wiener, *Social Analytic Jurisprudence, supra* note 15.

Note the connection between the simulation heuristic and the "discounting principle," according to which an observer discounts any one candidate as a potential cause for an event if other plausible causes are also present. Harold H. Kelley, *Attribution in Social Interaction, in* ATTRIBUTION: PERCEIVING THE CAUSES OF BEHAVIOR 1, 8-11 (Edward E. Jones et al. eds., 1972); *see also* FISKE & TAYLOR, *supra* note 40, at 38-39 (discussing the work of Kelley). The attorney who prompts the simulation of a particular alternative scenario and thus highlights one antecedent of the accident as a potential cause would thereby reduce the chance that the jurors would attribute causal force to other antecedents.

144. Kahneman & Miller, *supra* note 143, at 149.

"unusual time" version most often responded that undoing the time of departure from the office would have avoided the accident.[145]

This and other research show that people tend to imagine the alternative scenario that changes or "normalizes" (and thus locates as the actual cause) some surprising, "deviant" event in the actual story.[146] In the "unusual route" story, the man's choice of route is deviant; in the "unusual time" version, the deviance is his decision to leave the office early. The experiment also shows that people tend to imagine a counterfactual scenario that changes some feature of the main object of attention or concern: the behavior of the protagonist.[147] Relatively few subjects sought to undo the accident by changing what one might have imagined they would identify as the cause—the teenager's behavior.[148] The main object of attention in the typical accident case is likely to be the precautions taken (or omitted) to avoid the risk of accident.[149] Thus, the cause of an accident is likely to be perceived to be the act (or omission) that a protagonist could easily have chosen to do otherwise. It follows that the more readily jurors

145. Kahneman & Tversky, *supra* note 143, at 204-06. Kahneman and Tversky asked their subjects to imagine how the man's family would complete the thought, "If only . . . , [the accident would not have happened]." *Id.* at 206. This is substantially equivalent to a judgment of what caused the accident; *see infra* notes 158-59 and accompanying text (discussing sufficiency versus necessity senses of causation).

146. Kahneman & Miller, *supra* note 143, at 142-45 (observing that events are more "mutable," *i.e.*, more likely to be changed to yield simulations, to the extent they are exceptions to routines, violations of ideals, or involve focal rather than background actors); Miller et al., *supra* note 143, at 307-15 (adding that commissions are more likely to be undone than omissions, and that acts are more likely to be undone if actor had a range of options for acting); Wells et al., *supra* note 143, at 428-29 (adding that exceptions are more likely to be mentally coded as occurrences, norms as nonoccurrences; thus, perceived correlation between exceptions and outcomes may be stronger than that between norms and outcomes); *cf.* Wells & Gavanski, *supra* note 143, at 167 (qualifying norm theory to extent that people trying to understand a normal, as opposed to an exceptional, outcome, tend to mutate events toward the exceptional instead of toward the normal).

147. Kahneman & Tversky, *supra* note 143, at 205-06; *see also* Kahneman & Miller, *supra* note 143, at 144-45 ("the mutability of any aspect of a situation increases when attention is directed to it"; hence, the availability of a simulation that alters that aspect, and thus points to that aspect as the cause of what actually happened, increases when the aspect is the focus of attention).

148. Kahneman & Tversky, *supra* note 143, at 204-06.

149. *Cf.* Karlovac & Darley, *supra* note 2, at 314-15; *accord* Green, *supra* note 15, at 245-48 (observing that major determinant on whether defendant was judged to have acted reasonably was nature of defendant's precautions). *Cf.* Kahneman & Miller, *supra* note 143, at 145 (finding commissions more available than omissions, and thus more likely to be identified as causes); Mark F. Grady, *Untaken Precautions,* 18 J. LEGAL STUD. 139 (1989) (arguing that notwithstanding treatises' focus on general standard of reasonable care, courts decide negligence cases by analyzing whether accident was caused by one or more precautions that plaintiff proposes defendant could have taken but did not).

can imagine a person acting differently and thus avoiding the accident, the more likely they are to find that the person's conduct caused the accident, and that the person is at fault for not having acted otherwise.[150]

Use of the simulation heuristic often yields accurate causal attributions.[151] As with other instances of the availability heuristic, the most accessible information may in fact be the most valid basis for the inference to be made.[152] And the use of the simulation heuristic appears to be consistent with how the law typically defines a legally sufficient cause: one that is a "substantial factor" in bringing about the result.[153] But simulation can bias causal judgments because people do

150. For research indicating that use of the simulation heuristic affects judgments of fault and responsibility, and not merely causation, *see* Macrae, *supra* note 143, at 86 (finding that when counterfactual simulations were readily available, *e.g.*, when conduct preceding accident was abnormal, subjects compensated accident victims more and found perpetrators more negligent); Miller & McFarland, *supra* note 143, at 517 (reviewing two experiments in which abnormal outcomes led to higher compensation awards than normal outcomes; severity and probability of outcomes held constant); Ilana Ritov & Jonathan Baron, *Judgments of Compensation for Misfortune: The Role of Expectation,* 24 EUR. J. SOC. PSYCHOL. 525 (1994) (finding higher compensation awarded when accident occurred as result of exception to routine; *e.g.*, greater compensation when train engineer chose not to stop train than when he unsuccessfully tried to stop it); Wiener, *Social Analytic Jurisprudence, supra* note 15, at 534-41 (noting that the availability of mutations of defendant's conduct correlated with defendant's perceived fault). For related research that is consistent with norm theory, *see, e.g.*, Jonathan Baron, *Heuristics and Biases in Equity Judgments: A Utilitarian Approach, in* PSYCHOLOGICAL PERSPECTIVES ON JUSTICE, *supra* note 49, at 109, 124-28 (reporting experiments in which subjects awarded greater compensation when harm was caused by act than when caused by omission, and greater compensation when harm was caused by person than when caused by nature). For research finding no effect of the abnormality of an accident on mock jurors' damage awards, *see* Jane Goodman et al., *Runaway Verdicts or Reasoned Determinations: Mock Juror Strategies in Awarding Damages,* 29 JURIMETRICS J. 285, 297 (1989) (finding that mean damage award in "exceptional" condition was not statistically different than mean damage award in typical condition).

Note that the use of the simulation heuristic may lead to results inconsistent with those found by Karlovac & Darley, *supra* note 2 (noting that lay attributions of responsibility correspond to Learned Hand test of foreseeability and severity). For example, in Macrae's research, *supra* note 143, subjects found a woman who got food poisoning after eating at a restaurant she had not previously patronized (the abnormal or exceptional event) less responsible and awarded her greater compensation than they did a woman who got food poisoning at her usual restaurant. But if these subjects based their judgments on foreseeability, they might very well have found the first woman *more* responsible for her fate—she took the chance on an unusual restaurant. *See* Katherine Mary Demitrakis, How Thinking About Alternatives May Influence Social Perception: The Role of Counterfactual Thinking in People's Judgments of Sympathy, Blame, and Compensation 27 (1993) (unpublished Ph.D. dissertation, New Mexico State University).

151. *See* Wells & Gavanski, *supra* note 143, at 167.

152. *See supra* notes 51-54 and accompanying text (availability heuristic).

153. *See supra* note 140. The simulation heuristic, moreover, closely tracks Hart and Honore's classic conception of causation in law as a contingency, usually a human interven-

not necessarily change the prior event that was least likely to happen and thus most likely to have "made the difference" between what happened and what could have happened.[154]

In cases in which both the plaintiff and the defendant arguably contributed to the accident, we might expect both attorneys to evoke simulations favorable to their clients by characterizing some aspect of the other party's behavior as unexpected or out of the ordinary, because that would make it easier for jurors to conceive of an alternative scenario, minus the deviant conduct, in which the accident did not oc-

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tion, that changes what would otherwise have occurred. *See* HART & HONORE, *supra* note 127, at 32-44. Several students of attribution theory have observed this similarity. *See, e.g.*, Fincham & Jaspars, *supra* note 15, at 98-100; Hilton, *supra* note 142, at 67, 70-71; Lloyd-Bostock, *The Ordinary Man, supra* note 15, at 146-47; Thomas R. Schultz & Michael Schleifer, *Towards a Refinement of Attribution Concepts, in* ATTRIBUTION THEORY AND RESEARCH, *supra* note 15, at 37, 47-48.

154. For instance, in the experiment described in the text, no subjects chose to undo the event with the lowest prior probability: the man's reaching the intersection precisely when he did, instead of a few seconds sooner (in which case he would have gone through). Kahneman & Tversky, *supra* note 143, at 205. The authors observe: "The finding is typical: Events are not mentally undone by arbitrary alterations in the values of continuous variables." *Id. But see* Wells et al., *supra* note 143, at 422 (creating a simulation by substituting one arbitrary value of a continuous variable for another is not uncommon).

It can readily be seen that causal analysis using the simulation heuristic may diverge from the scientific norm, because the heuristic yields judgments similar to those promoted by the logical fallacy of *post hoc, ergo propter hoc,* with the abnormal event identified as "hoc." For example, consider the Bendectin products liability litigation. Despite overwhelming scientific evidence showing no statistically significant correlation between prenatal exposure to Bendectin and the birth defects complained of, some juries continued to find for plaintiffs. *See, e.g., Richardson v. Richardson-Merrell, Inc.,* 649 F. Supp. 799 (D.D.C. 1986) (granting j.n.o.v. to defendant upon finding that no reasonable jury could conclude based on scientific evidence that Bendectin more likely than not caused birth defects); *see also Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 113 S. Ct. 2786, 2799 (1993) (vacating and remanding affirmance of grant of summary judgment to defendant, Supreme Court rules that trial judge, applying Federal Rule of Evidence 702, has duty to ensure that expert testimony is relevant and rests on a "reliable foundation," which means that it is based on "scientifically valid principles"); Cecil et al., *supra* note 8, at 740-42 (discussing how courts limit range of juries' decision-making by requiring that expert testimony in Bendectin and other toxic tort cases be based on epidemiological evidence). Juries' reasoning on causation in these cases is explicable in terms of the simulation heuristic. The actual scenario, in which the pregnant woman took Bendectin and her infant suffered birth defects, could be contrasted with a "normal," background simulation in which she did not take Bendectin and in which the infant was born healthy. Consequently, the taking of Bendectin could be found to be the (necessary and sufficient) cause of the birth defects.

The same method of causal reasoning by *post hoc, ergo propter hoc* applies to positive outcomes (and not only to negative ones, like injury-producing accidents), and leads many laypeople to attribute causal efficacy, *e.g.,* to any medical intervention, however worthless. GILOVICH, *supra* note 59, at 127-29. "When an intervention is followed by improvement, the intervention's effectiveness stands out as an irresistible product of the person's experience," even though the body's own healing processes are likely to yield the improvement without any intervention at all. *Id.* at 128.

cur. The attorneys might be expected to rely on stock scripts for situations like the one that led to the accident, in terms of which the client's actual behavior appears normal and the opposing party's appears deviant.[155]

We might also expect counsel to describe what happened in a way that matches laypeople's general schemas for causation. One of these schemas is that causes resemble their effects, and hence a mishap that had a big effect, *e.g.*, a severe injury, must have a big cause, namely, serious misconduct.[156] Another is that causes are linked to their effects by short, simple chains—the two are close in space and time.[157]

155. *See supra* notes 75-85 and accompanying text (discussing stock scripts in connection with narrative prototypes); *see also* Kahneman & Miller, *supra* note 143, at 149 (showing how making client's behavior appear normal eliminates it as an apparent cause of the event because the cause cannot be normal or "default" value among the conditions from which event to be explained arose).

156. This is, of course, an instance of the representativeness heuristic. NISBETT & ROSS, *supra* note 13, at 115-18, point out that lay causal schemas tend to attribute big effects to big causes. Therefore, jurors might be expected to attribute the cause of a severe injury, a big effect, to some major departure from ordinary behavior—not just a mere variation in normal conduct but negligence, if not worse. *See, e.g.*, Keith Scheider, *Jury Finds Exxon Acted Recklessly in Valdez Oil Spill*, N.Y. TIMES, June 14, 1994, at A1, A18 (according to defendant's attorney, "[p]eople have an understandable tendency to equate the seriousness of the consequences with the conduct that led up to it . . . . If a minor mistake has very serious consequences, people will see the mistake as being greater than it was.").

For evidence of the influence of the representativeness heuristic on causal predictions and explanation, *see* Stephen J. Read, *Once Is Enough: Causal Reasoning from a Single Instance*, 45 J. PERSONALITY & SOC. PSYCHOL. 323 (1983) (finding that subjects relied on similarity of target person to previously experienced person rather than on rule to predict target person's behavior). *Cf.* Joel T. Johnson & Jerome Drobny, *Happening Soon and Happening Later: Temporal Cues and Attributions of Liability*, 8 BASIC & APPLIED SOC. PSYCHOL. 209, 231 (1987) [hereinafter Johnson & Drobny, *Happening Soon*], in which the authors try to explain their experimental observation that subjects held defendants less responsible for effects temporally distant from the acts causing them (*see infra* note 157 and accompanying text). Johnson and Drobny speculate that subjects possess a prototype for causation that includes actor and outcome as part of same unit; within this unit, the representativeness heuristic leads subjects to ascribe to the actor the (negative) characteristics of the outcome. Delay between act and outcome may sever the unit, leading subjects not to taint the actor by the outcome.

157. FISKE & TAYLOR, *supra* note 40, at 58-59; Joel T. Johnson & Jerome Drobny, *Proximity Biases in the Attribution of Civil Liability*, 48 J. PERSONALITY & SOC. PSYCHOL. 283, 292-94 (1985) [hereinafter Johnson & Drobny, *Proximity Biases*] (finding "causal proximity bias": when negligent act that is but-for cause of injury has been identified, subjects viewed effect as more foreseeable and actor as more clearly liable the fewer the number of intervening events, *i.e.*, the simpler the causal chain; subjects also viewed actor as more clearly liable the closer in time his negligent act was to the injury, though this temporal proximity effect varied with type of case); *see also* Philip Brickman et al., *Causal Chains: Attribution of Responsibility as a Function of Immediate and Prior Causes*, 32 J. PERSONALITY & SOC. PSYCHOL. 1060, 1066 (1975) (pointing out that the longer the per-

The general structure of causal explanations suggests a further hypothesis about strategic uses of the simulation heuristic. Both the necessity and the sufficiency of a condition are relevant to lay judgments of its causal force, although it is unclear which is more important.[158] By invoking the simulation heuristic, the plaintiff's lawyer may attempt to show that the defendant's behavior was both necessary and

ceived causal chain, the less the perceived responsibility of human actors). Johnson & Drobny, *Proximity Biases, supra,* at 295, specifically comment that plaintiffs' attorneys should take advantage of these proximity biases in causal attribution by making "the chain from act to injury appear as simple and succinct as possible," while defendants' attorneys should argue the opposite. They also suggest that plaintiffs' attorneys who have to argue for a long cause-effect delay should try to counteract the proximity biases by invoking the long latency periods associated with cancer, heart disease, or other such well-known phenomena. *See also* Johnson & Drobny, *Happening Soon* at 230-33 (finding that defendants but not plaintiffs were perceived as less liable when injury occurred an unexpectedly long time after acts causing injury; this seems to be due to a perceived weakening of the cause-effect link and not to increased attributions to alternative causes). *But cf.* Amiram Vinokur & Icek Ajzen, *Relative Importance of Prior and Immediate Events: A Causal Primacy Effect,* 42 J. PERSONALITY & SOC. PSYCHOL. 820, 827-28 (1982) (observing "causal primacy" phenomenon: when two causes have equal weight in bringing about an effect when viewed independently, first cause in two-cause chain is perceived to have greater causal impact).

For an attempt to synthesize the research on these sorts of "causal cues" with other research on various aspects of causal judgment, *see* Hillel J. Einhorn & Robin M. Hogarth, *Judging Probable Cause,* 99 PSYCHOL. BULL. 3 (1986).

Laypeople may also have content-specific intuitions about causation. In one experiment, subjects read one of three versions of a scenario in which a woman contracted ovarian cancer: in one, she alleged that her cancer was due to chemicals from a nearby dump which contaminated the water supply; in a second, to the ink she used in calligraphy; in a third, to birth control pills. Bornstein & Rajki, *supra* note 21, at 132-33. The scientific evidence presented exactly the same causal information in all three versions. *Id.* Yet more subjects attributed the victim's cancer to the chemicals in the dump than to either of the other possible causes. *Id.* at 142. Thus, subjects appeared to judge causation in accordance with prior, implicit theories about what causes what: specifically, that cancer is more likely to be caused by chemicals (or environmental toxins generally) than by the other sources. *Id.*

158. A prior event that is perceived to be both a necessary and sufficient condition of a later event presents the strongest case for causation; a condition that is neither necessary nor sufficient presents the weakest. Kathleen M. McGraw, *Conditions for Assigning Blame: The Impact of Necessity and Sufficiency,* 26 BRIT. J. SOC. PSYCH. 109, 110 (1987); *see also* Schultz & Schleifer, *supra* note 153, at 47-48 (analyzing causal attributions in terms of necessity and sufficiency). McGraw summarizes reasons why sufficiency might be expected to have a greater impact than necessity on causal judgments, but her own research did not confirm this. McGraw, *supra,* at 115. Indeed, other research has indicated that people use necessity but not sufficiency information in making causal judgments. *See* Schultz & Schleifer, *supra* note 153, at 48-52 (discussing and suggesting explanations for earlier research results). *But cf.* Patricia W. Cheng & Richard E. Nisbett, *Pragmatic Constraints on Causal Deduction, in* RULES FOR REASONING, *supra* note 49, at 207-27 (necessity and sufficiency do not explain lay use of causal concepts; experimental subjects employ what authors call "pragmatic reasoning schemas" to augment their understanding of necessity and sufficiency).

sufficient to bring about the accident: necessary, because the simulation shows that without that behavior, the accident would not have occurred; sufficient, in that the simulation highlights the defendant's actual behavior among the accident's antecedents.[159] The defendant's lawyer, meanwhile, can use simulation to show that his client's behavior was not necessary to bring about the accident, if the simulation lacks that behavior but does include the accident. Thus, we might expect to see two simulation strategies in cases in which both parties' behavior arguably contributed to the accident: the offensive strategy of showing that the other party's behavior was necessary and sufficient to bring about the accident, and the defensive strategy of showing that the client's behavior was not necessary for the accident.[160]

(2) The Simulation Heuristic in the Arguments

The simulation heuristic helps us make sense of many causation arguments in accident cases. In *Roe v. Hocon Gas,*[161] the attorneys' uses of the simulation heuristic lead to what appear to be correct causal attributions.[162] Hocon periodically delivered propane gas to the Roes. One afternoon Alexander Roe, resting in his living room, heard a hissing and smelled gas coming from the kitchen. After getting a telephone repairman who happened to be working outside his house

The legal definitions corresponding to these two senses of causation are, respectively, the "but for" test, *see* KEETON ET AL., *supra* note 1, § 41, at 265-67), and the "substantial factor" test, *see id.* at 267-69.

159. This analysis is based on the logical definitions of sufficiency (if *p,* then *q*) and necessity (*q* only if *p,* and thus, if not *p,* then not *q*). Note that Kahneman & Tversky asked their subjects to complete a line of thought beginning with "If only . . . ," which appears to solicit a judgment about the necessity, not the sufficiency, of the target condition. *See supra* notes 143-150 and accompanying text (simulation heuristic experiment). As a purely logical matter, the plaintiff's lawyer cannot use the simulation heuristic to prove that the defendant's behavior was necessary for the accident, because that would require an indefinitely large number of scenarios, in each of which the absence of the target behavior is followed by no accident.

160. Note that the remaining strategic possibility, showing that the client's behavior was not sufficient to bring about the accident, is accomplished not through the simulation heuristic per se but through counterfactual reasoning using evidence of customary behavior. Evidence that the client's behavior conforms to custom amounts to a contrast between the actual events and one or more scenarios in which the target behavior does occur but the accident does not. In standard tort doctrine, evidence that a party's behavior conforms to custom is probative but not conclusive of due care. *See* KEETON ET AL., *supra* note 1, § 33, at 193-96.

161. CV-91-0117822S (Conn. Super. Ct. Jud. Dist. of Stamford/Norwalk at Stamford 1994). All citations are to the trial transcript of January 14, 1994 unless otherwise specified.

162. The attributions of the causes of the explosion and Roe's injury, respectively, are "correct" in the sense that the simulations change the prior events with the lowest objective *ex ante* probabilities.

to come inside and confirm his suspicions, Roe went out into his front yard, together with his wife and the repairman. Roe then walked back in, and the house blew up. Roe died of his injuries a month later.

Both lawyers offer the jurors simulations to identify the cause of Roe's fatal injuries. Roe's attorney focuses much of his argument on Hocon's duty to replace the regulator on the Roes' propane tank, which was at least 30 years old at the time of the accident. He thus contrasts Hocon's failure to replace the regulator with the implicit "normal" simulation: if Hocon had replaced the old regulator with a new one, the explosion would not have occurred.[163] Hocon's lawyer counters with an explicit, obvious simulation: "If Mr. Roe had not gone back into the house, he wouldn't have been hurt . . . . Mrs. Roe and Mr. Perillo [the telephone company repairman] didn't go back into the house and they weren't hurt."[164]

In *Butler,* the plaintiff's attorney uses the simulation heuristic to persuade jurors to adopt a more problematic causal attribution. Neither the law[165] nor the evidence[166] in *Butler* dictates the "normal" scenario for loading machinery onto trucks and covering it with a tarpaulin, leaving the attorneys free to suggest simulations that favor their respective clients. Only Butler's attorney argues as if jurors will

163. Roe's attorney's argument that the explosion must have been caused by the age of the regulator implicitly depends on the simulation heuristic for the following reason. There is some evidence that regulators more than 15 years old should be replaced, regardless of condition (R. 71.20-72.2, 82.5-8, 82.12, 85.9-10, 94.17-21 (Jan. 11, 1994); R. 156.9-22 (Jan. 12, 1994)), and when Hocon learned of this sometime in 1989, it began a program to replace them (R. 158.6-163.17 (Jan. 12, 1994)). But most regulators don't fail. Presumably many older regulators were still in use as of the date of the Roes' accident, yet theirs was the only one involved in an explosion. That is, it could be argued that the defendant's alleged negligence in allowing the use of an older regulator was not sufficient to cause the accident. For the argument to make sense, then, jurors must imagine an alternative scenario: new regulators don't fail, so that if Hocon had replaced the Roe's old regulator with a new one, the explosion would not have occurred.

164. R. 69.13-14, 69.18-19. The "normal" counterfactual scenario—Roe stays outside with his wife and Perillo instead of going back inside—is so readily constructed that Roe's attorney does not try to contest the causal argument it implies. Instead, he argues at great length that Roe did not act unreasonably in going back inside because he should not have foreseen the explosion, and that to hold him responsible would be unfairly to blame the victim (R. 38.25-41.9). *See infra* notes 198-99 and accompanying text (describing fundamental attribution error and anti-plaintiff bias).

165. Revere's attorney correctly observes that it is the driver's duty to secure the load (B. 32.12-33.2); Butler's attorney acknowledges this and counters that this duty does not mean that the driver has to do the whole job himself (B. 36.14-37.11). The judge agrees (B. 54.1-12; *see also* B. 58.26-59.8 (Apr. 25, 1990) (same)). *But cf. supra* note 110 (contract norm of reciprocity may govern Butler's and Brockway's behavior).

166. *See supra* note 109 (evidence about "normal scenario" for loading and tarping machinery).

use the simulation heuristic to determine causation,[167] but these arguments are central to his only sustained narrative of the accident.[168] He evokes simulation in four ways. First, he introduces the idea of thinking in terms of alternative scenarios by saying: "On January 20, 1986 [Butler's] life changed and it didn't have to be changed this way."[169] Second, he argues that Revere changed the work order detailing what machinery Butler was to load onto the truck.[170] It is unclear how this change, if indeed it occurred,[171] could have made it any more likely that Butler would hurt himself; the lawyer's strategy, apparently, is merely to prompt the jurors to think "what if."[172] Third, Butler's attorney questions why Revere wanted the machinery covered with a tarpaulin at all.[173] By questioning the rationality of this demand, the lawyer indicates that Revere's conduct was deviant and, of course, leads the jurors to infer that if Butler had not been required to cover the load, he would not have fallen and hurt himself.[174]

Fourth and most importantly, Butler's lawyer argues that Revere's employees, especially Brockway, "didn't lift a finger" to help Butler cover the load; instead, they went on their coffee break.[175] It "[w]ouldn't have taken very much," but Brockway let Butler struggle alone with the tarpaulin "for the sake of a cup of coffee."[176] Thus the attorney prompts the jurors to imagine a scenario in which the defendant's employees help their fellow laborer for a few moments, putting off their coffee break for that long. In contrast, the "cup of coffee"—

167. Perhaps this is to be expected. Revere's counsel's basic argument is not so much that Butler caused the accident—recall that there is no evidence about how Butler fell—as that Revere owed no duty to help Butler, and thus was not culpable for not helping him. *But see infra* text following note 196 (suggesting how lawyers for defendants in general might be expected to counter the implicit "someone's to blame" schema).

168. B. 25.4-27.24; *see supra* notes 109-12 and accompanying text for a discussion of this story.

169. B. 24.5-6.

170. B. 24.12-25.3; *see also* B. 37.12-38.3 (rebuttal).

171. Whether the work order was changed is the only significant dispute of fact in the summations. *See* B. 35.12-24.

172. Butler's attorney may also be trying to enhance the image of his client as a good soldier who did what he was asked. *See, e.g.,* B. 24.12-24.

173. B. 25.4-12.

174. Requiring the load to be tarped was not "unreasonable" in the legal sense that it unreasonably increased the risk of harm to Butler or others. *See, e.g.,* KEETON ET AL., *supra* note 1, § 31, at 169-70 (defining negligence as the creation of unreasonable risk). Counsel may be counting on jurors' tendency to assume fault, discussed *infra* notes 182-88 and accompanying text.

175. B. 26.20-27.24.

176. B. 27.22-24.

the failure to help—becomes the salient, deviant behavior, and hence the leading causal candidate for Butler's fall.[177]

To appreciate how this use of the simulation heuristic departs from other plausible causal attributions,[178] recall that there is no evidence at all of how Butler fell, and thus no way to determine whether Revere's employees' failure to help really had anything to do with the fall. For all we know, it is at least as likely that Butler fell because he simply lost his footing, without any carelessness on anyone's part. But such a slip—like the lapse in concentration or attention that probably caused John Giulietti's death[179]—does not stand out as a distinct event that can be contrasted to a no-accident simulation (which may be one reason why Revere's attorney does not use this heuristic to argue that Butler caused the accident). A misstep is like arriving at the intersection a few seconds earlier, rather than leaving the office at an unusual time or travelling by an unusual route.[180] The conduct of the defendant's employees, as Butler's attorney describes it, does stand out.[181]

E. The Fundamental Attribution Error: Assigning Blame

Social psychological research strongly suggests that jurors are prone to assume that if an accident has occurred, someone deserves blame for it, and to allocate that blame based on the sorts of people they perceive the parties to be. Both habits of thought flatly contradict the law of negligence, which requires proof of fault and makes relevant to fault only the parties' behavior under the circumstances, not the types of people they are. Negligence lawyers, therefore, argue about fault implicitly as well as explicitly, using a variety of rhetorical techniques to invoke jurors' common sense attributions while outwardly conforming to the law.

177. *See supra* notes 109-12 and accompanying text (normal scenario and deviance in *Butler*).

178. *See, e.g., supra* note 158 (scientific model of cause as necessary and sufficient condition).

179. *See supra* text following note 115 (describing facts of *Giulietti*); *supra* notes 123-24 and accompanying text (noting railroad's attorney's effort to define John Giulietti's lack of attention as culpable carelessness).

180. *See supra* notes 145-50 and accompanying text (describing simulation heuristic experiment).

181. *Cf.* Ritov & Baron, *supra* note 150, at 529-30, 537 (finding that with causation and harm held constant, experimental subjects awarded greater compensation when harm was caused by train engineer's deliberate refusal to stop train than by his unsuccessful attempt to stop it).

(1) Attribution Theory and Judgments of Legal Responsibility

(a) The Fundamental Error Generally

Psychologists have identified as the "fundamental attribution error" the tendency inappropriately to attribute the behavior of another person to her corresponding dispositions or traits (*i.e.*, "the sort of person she is") rather than to the circumstances in which she finds herself, including role demands.[182] In one experiment, listeners assumed that speakers' pro-Castro remarks corresponded to the speakers' private opinions even though the listeners knew that the speakers were obeying the experimenter's explicit request to make those remarks.[183] In another, subjects were arbitrarily assigned to play the role of either questioner or contestant in a general-knowledge quiz game. Questioners were able to display esoteric knowledge and to avoid topics of which they were ignorant; contestants, obviously, lacked these role-defined advantages. Both contestants and uninvolved observers familiar with the experimental roles rated the questioners as generally more well-informed, even though the questioners' superior display of knowledge plainly depended on their role in the experiment.[184] As these examples illustrate, attributions of behavior to the actor's traits rather than to the circumstances are likely to be erroneous because, and to the extent that, there is little correlation between dispositions and behavior across different situations.[185]

182. *See* Ross & Anderson, *supra* note 141, at 135-40.

183. *Id.* at 136 (citing research of Jones and Harris).

184. *Id.* at 136-38 (citing research of Ross et al.).

185. *See* Thomas C. Monson, *Implications of the Traits v. Situations Controversy for Differences in the Attributions of Actors and Observers, in* ATTRIBUTION THEORY AND RESEARCH, *supra* note 15, at 293, 295-97. Normatively, the observer's knowledge that the actor's behavior conforms to social role ought to lead the observer to conclude that the behavior does not tell her much about the actor's dispositions. *See* FISKE & TAYLOR, *supra* note 40, at 26-28 (summarizing work of Jones and Davis; also noting that to the extent an actor's behavior is perceived not to be the result of choice or to be socially desirable, the behavior ought not to be considered informative about the actor's dispositions).

Some social psychologists have questioned the cogency and even the existence of the fundamental attribution error, arguing that more recent research has not established that people display a general predilection to attribute causes to dispositions rather than circumstances, has failed to substantiate the systematic differences between actor and observer attributions on which the fundamental attribution error is partly based, and has failed to demonstrate that attributions to the person are any more likely to be erroneous than attributions to the circumstances. *See, e.g.*, Icek Ajzen & Martin Fishbein, *Relevance and Availability in the Attribution Process, in* ATTRIBUTION THEORY AND RESEARCH, *supra* note 15, at 63, 80-83; John H. Harvey et al., *How Fundamental is "The Fundamental Attribution Error"?*, 40 J. PERSONALITY & SOC. PSYCHOL. 346 (1981) (arguing that imputation of enduring dispositions to persons may be tenable); John H. Harvey & Richard P. McGlynn, *Matching Words to Phenomena: The Case of the Fundamental Attribution Error*, 43 J. PER-

The fundamental attribution error reflects both the availability and representativeness heuristics. It derives from the availability heuristic because, in social settings, actors tend to appear more salient, and hence are more available, than situational elements, and are thus more likely to be seen as causal agents.[186] It also derives from overreliance on the representativeness heuristic because it treats behavior as representative of a dispositional state it resembles.[187]

This cognitive habit suggests two implications for jurors' decisions in accident cases. First, jurors are likely to assume that accidents don't happen unless someone was negligent. Second, they are likely to attribute causation (and, hence, fault and responsibility) on the basis of the parties' personal dispositions.[188] I will explain each of these implications in turn.

SONALITY & SOC. PSYCHOL. 345 (1982) (questioning "fundamental" status of fundamental attribution error); Monson, *supra* at 297-313 (criticizing and elaborating on fundamental attribution error explanation for actor/observer differences in attributions); William Turnbull & Ben R. Slugoski, *Conversational and Linguistic Processes in Causal Attribution, in* CONTEMPORARY SCIENCE, *supra* note 142, at 72-74 (suggesting that attribution of causes is shaped by conversational and informational needs rather than by any inherent bias toward personal attribution). For a review of this research, *see* FISKE & TAYLOR, *supra* note 40, at 69-72, 74-75.

For cross-cultural research indicating that attributions to the person may result from broader cultural meaning systems rather than (solely) from innate cognitive processes, *see* Joan G. Miller, *Culture and the Development of Everyday Social Explanation,* 46 J. PERSONALITY & SOC. PSYCHOL. 961, 973 (1984) (finding that American adults attribute behavior to general dispositions rather than to contextual factors to a greater extent than do Hindu adults or American children and arguing that differences may be due to contrasting cultural conceptions of the person, in particular the Western emphasis on individualism); *see also* V. LEE HAMILTON & JOSEPH SANDERS, EVERYDAY JUSTICE 119 (1992) (finding that Americans tend to view the responsible actor as an isolated individual, equal in status to others, whereas Japanese tend to determine responsibility by viewing the actor contextually, as a person with close, hierarchical ties with others).

186. Shelley E. Taylor, *The Availability Bias in Social Perception and Interaction, in* JUDGMENT UNDER UNCERTAINTY, *supra* note 38, at 192-94; *see also* NISBETT & ROSS, *supra* note 13, at 122-27 (describing research showing that people tend to attribute more causal force to actors they can perceive than to those they cannot); *infra* note 206 (research on actor-observer effect).

187. NISBETT & ROSS, *supra* note 13, at 120; Sherman & Corty, *supra* note 43, at 203-04. That is, the fundamental attribution error reflects the representativeness heuristic in that people believe that causes resemble their effects, and therefore, that an effect (*e.g.,* selfish behavior) must be due to a cause it resembles (a selfish disposition) rather than one it does not (*e.g.,* the circumstances). *Cf. supra* note 156 and accompanying text (representativeness heuristic and causal reasoning).

188. This discussion highlights the role of attribution error, but is not meant to suggest that it is the only factor in jurors' causal attributions. For instance, according to the "locus of control" theory, jurors' causal attributions may vary depending on whether they are "externals," who tend to perceive reinforcing events for behaviors (*e.g.,* promotions or demotions at work, good or bad grades at school, etc.) as driven by causes external to

(b) "Someone's to Blame"

The fundamental attribution error should dispose jurors to find that accidents are due to someone's negligence—that "someone's to blame"—because jurors are asked to determine the reasonableness of a party's behavior by comparing it to the conduct of the "reasonably prudent person" or "ordinarily prudent person" in similar circumstances.[189] If the reasonably prudent person would have acted differently, the party is negligent.[190] The fundamental attribution error answers essentially the same question: Would others have acted differently?[191] Recall that the fundamental attribution error is to attribute the actor's behavior to his personality, to something "in" him, rather than to the circumstances. This is tantamount to saying that some substantial percentage of others would have acted differently under the circumstances. If most others would have acted the same way as the actor did, then the attribution, logically, would have to be to the circumstances, because nothing "in" the actor led him to act differently from the norm. Hence, the tendency to commit the fundamental attribution error would lead jurors to differentiate the actor's behavior from the norm, and thus to hold him responsible for acting as he did.[192]

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themselves, or "internals," who believe that they themselves are responsible for bringing about reinforcing events. *See* FISKE & TAYLOR, *supra* note 40, at 86-91 (discussing work of Rotter and others).

189. *See supra* note 86 (standard negligence instructions).

190. Unless, of course, the party exercised *greater* care than the reasonably prudent person would have under the circumstances. This possibility is not at issue in many cases, including those studied in the present research, and thus can be ignored for purposes of this Article.

191. According to textbook law, behavior in accordance with custom is usually probative but not dispositive of due care. *See* KEETON ET AL., *supra* note 1, § 33 at 193-96. Compliance with customary behavior does not absolve a business entity from responsibility if the custom of the entire industry is careless. *Id.* at 194-95 (citing *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932)). Conversely, a divergence from custom does not conclusively establish carelessness. KEETON ET AL., *supra* at 195. But generally speaking, the "reasonably prudent person" corresponds to how (the jurors think) people other than the actor (*i.e.*, an idealized version of themselves) would have behaved in similar circumstances (*see supra* note 92 and accompanying text); at the very least, the hornbook law of negligence allows jurors great latitude to equate the two.

192. Why a comparison between the party's behavior and that of the reasonably or ordinarily prudent person in similar circumstances should yield attribution error may be explained in terms of Harold Kelley's highly influential covariational model of attribution. Harold H. Kelley, *The Processes of Causal Attribution*, 28 AM. PSYCHOL. 107, 108-13 (1973). According to Kelley, observers making causal attributions need not only "consensus" information (how do other people behave in this type of situation?), but also "distinctiveness" information (how does the actor behave in other types of situations?) and "consistency" information (how does this actor behave in this type of situation on other

This point can be made another way. Assume that no one is responsible for the accident, in the sense that no one is at fault. The accident "just happened." This amounts to saying, of each party, that there is no good reason to expect that party to have acted differently in order to avoid the accident. Under the circumstances, anyone else would have behaved the same way. But this conflicts with the fundamental attribution error, which posits that under the circumstances, others would not have behaved the same way. The commission of the fundamental attribution error, therefore, is inconsistent with the assumption that no one is responsible for the accident.[193]

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occasions?). At the poles, low consensus (others don't act this way in similar circumstances) and low distinctiveness (the actor behaves this way in other circumstances) lead to an attribution of causation to the person; high consensus (others act this way in similar circumstances) and high distinctiveness (the actor doesn't behave this way in other circumstances) lead to an attribution of causation to the circumstances. *See, e.g.,* FISKE & TAYLOR, *supra* note 40, at 33-36 (summarizing Kelley's covariational theory); Hilton, *supra* note 142, at 68-69 (same). The standard instruction, at best, asks only about the consensus dimension. The highly important distinctiveness dimension remains implicit. To the extent to which jurors attribute in conformance with the standard covariational model, they must address the distinctiveness dimension by constructing a personality profile for the actor: Is he or isn't he the sort of person who acts this way in other situations, in the presence of other stimuli? Thus, the instruction implicitly allows for the fundamental attribution error.

Note that Kelley's covariational model may be applicable to jurors' determinations of reasonableness only by analogy. First, it is a model for attributing causation, not responsibility (*but see infra* note 193 on close relation between the two concepts; *see also* Judith A. Howard & Randy Levinson, *The Overdue Courtship of Attribution and Labelling,* 48 SOC. PSYCHOL. Q. 191 (1985) (applying Kelley's model to mock criminal jury deliberations; finding, *inter alia,* that jurors tended to find defendants who behaved abnormally in normal situations guilty, and to find defendants who behaved normally in very abnormal situations not guilty)). Second, the covariational model requires data of multiple instances of the relevant behaviors, varying for actor, stimulus, and circumstances. Third, jurors may judge causation by using some other, counterfactual model. For discussions and critiques of Kelley, *see, e.g.,* Charles Abraham, *Seeing the Connections in Lay Causal Comprehension: A Return to Heider, in* CONTEMPORARY SCIENCE, supra note 142, at 145; Hilton, *supra* note 142, at 69-71.

193. The fundamental attribution error concerns judgments about the causes of behavior, not about responsibility for outcomes, which is the question jurors must decide. It is nevertheless appropriate to conflate, as does my argument in the text, the attribution of causation (of the behavior) with the attribution of responsibility (for the outcome) in the present context.

In the psychological research, people commit the fundamental attribution error when asked the question: Why did the person act that way—was it the circumstances or his personal disposition? Jurors deciding accident cases confront what appears to be a very different question: Is the actor responsible for the accident? And this latter question ought to break down into two further distinct inquiries: whether the act caused the accident, and whether the person acted as she did because she was careless. The hypothesis that the fundamental attribution error yields the presumption that "someone's to blame" thus seems to confuse the attribution of causation (of the behavior) with the attribution of responsibility (for the outcome).

Many social psychologists are careful to observe that attributions of causation and responsibility are different matters. *See, e.g.,* FISKE & TAYLOR, *supra* note 40, at 83-86; SHAVER, *supra* note 15, at 63-113; Fincham & Jaspars, *supra* note 15, at 81, 82-85; McGraw, *supra* note 158, at 109-17 (distinguishing between causation and blame); Kelly G. Shaver & Debra Drown, *On Causality, Responsibility, and Self-Blame: A Theoretical Note,* 50 J. PERSONALITY & SOC. PSYCHOL. 697, 700-01 (1986) (same).

Specifically, an attribution of causation is ordinarily necessary but not sufficient for an attribution of responsibility. On causation as necessary for responsibility, *see, e.g.,* Fincham & Jaspars, *supra* note 15, at 125-27 (discussing variations on possible relationship of entailment among attributions of causation, responsibility, and blame). Responsibility without causation may arise when a person in a certain relationship to one who causes harm is held answerable, *e.g.,* vicarious liability of an employer for acts by employees within the scope of employment. An attribution of causation, however, is ordinarily not sufficient for an attribution of responsibility. The latter involves other dimensions, such as the extent to which the actor was free to act and whether he should have foreseen the likely consequences. *See, e.g.,* FISKE & TAYLOR, *supra* note 40, at 83-84; SHAVER, *supra* note 15, at 84-86. A third factor that might arguably lead to an attribution of causation but not responsibility for an accident is the presence of an intervening cause.

The usual relationship between attributions of causation and responsibility was captured in FRITZ HEIDER, THE PSYCHOLOGY OF INTERPERSONAL RELATIONS (1958). In this classic work, which provided a structure and research program for much subsequent work in the field, Heider analyzed the attribution of responsibility into five levels. The first level is an attribution based on the mere association of the target with the effect; the second, causation of the effect by the target; the third, causation with foreknowledge that the effect was likely to occur; fourth, causation with intention to bring about the effect; and fifth, intentional causation of the effect but with a justification. *Id.* at 112-14. *See* Fincham & Jaspars, *supra* note 15, at 91 (discussing Heider's levels of attribution of responsibility); *see also* FISKE & TAYLOR, *supra* note 40, at 25-26 (same). It can readily be seen from this typology that a judgment of responsibility ordinarily requires something in addition to an attribution of causation.

Legal doctrine, of course, recognizes some of these distinctions. For instance, tort law absolves from responsibility persons who were physically unable to control their harmful behavior. *See, e.g.,* KEETON ET AL., *supra* note 1, § 29, at 163 (describing the doctrine of unavoidable accident; *see Weaver v. Ward,* 80 Eng. Rep. 284 (K.B.1616)). On the other hand, for various policy reasons, the law permits the attribution of responsibility in some circumstances upon a mere showing that the actor caused the injury, without requiring an attribution of responsibility in any other sense. This is strict liability. *See* KEETON ET AL., *supra* note 1, §§ 75-81, at 534-83.

Notwithstanding these distinctions between attributions of causation and responsibility, the fundamental attribution error is relevant to attributions of responsibility for accidents for two reasons. First, the distinction between behavior and outcomes diminishes in jurors' minds because, based on the simulation heuristic, jurors should already be likely to attribute the cause of the accident to one or more acts or omissions of a party, especially precautions taken or foregone. Thus, an inquiry into the cause of the behavior in question will appear to jurors to be an inquiry into a possible cause of the accident.

Second, the two requirements beyond causation for attributing responsibility for outcomes, control and foreseeability, are also implicitly satisfied in the context of the accident case. The law regards the actor as free to act in the absence of evidence of mental incapacity, compulsion, or unavoidable accident. KEETON ET AL., *supra* note 1, § 32, at 176-79 (mental capacity); *id.* § 29, at 162-64 (compulsion, unavoidable accident). Furthermore, the "hindsight bias" implicitly furnishes the foreseeability dimension of responsibility. According to the hindsight bias, knowing that an outcome has occurred increases its perceived

likelihood. Baruch Fischhoff, *For Those Condemned to Study the Past: Heuristics and Biases in Hindsight, in* JUDGMENT UNDER UNCERTAINTY, *supra* note 38, at 335, 341-43 [hereinafter Fischhoff, *Heuristics*]; Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty,* 1 J. EXPERIMENTAL PSYCHOL.: HUM. PERCEPTION & PERFORMANCE 288-99 (1975) [hereinafter Fischhoff, *Outcome Knowledge*]; Hawkins & Hastie, *supra* note 49 (surveying research on hindsight bias and explaining the causes of bias). People judge what actually happened as having been more foreseeable than it was, and therefore judge the actor as more responsible for not predicting and avoiding it. Taken together, the assumptions that the actor could have behaved differently and should have foreseen the consequences of his behavior lead under hornbook negligence law to the conclusion that the actor is at fault for not acting differently. *See* Loftus & Beach, *supra* note 49, at 949 (speculating that jurors, knowing the unfortunate outcome, should be readier to find conduct unreasonable because actor should have foreseen risks); *see also* Casper et al., *supra* note 74, at 308-09 (finding that hindsight bias may account for criminal jurors' inability to obey instructions to disregard pretrial publicity and inadmissible testimony and suggesting application of hindsight bias to analysis of juror decision-making in tort cases). Thus, the fundamental attribution error should bias jurors' attributions of responsibility for accidents, and not merely their attributions of the causes of behavior.

Empirical justification for conflating attributions of causation and responsibility, applicable generally and not just to accident cases, is provided by research showing that in terms of Heider's levels of responsibility (*see* HEIDER, *supra,* at 112-14), the greatest marginal increase in attribution of responsibility occurs when causation, and not merely association, is present. *See* SHAVER, *supra* note 15, at 103-04; F. Fincham & J. Jaspars, *Attribution of Responsibility to the Self and Other in Children and Adults,* 37 J. PERSONALITY & SOC. PSYCHOL. 1589 (1979). Further support for this conflation of causation and fault may be inferred from Mark D. Alicke, *Culpable Causation,* 63 J. PERSONALITY & SOC. PSYCHOL. 368 (1992) (concluding that test subjects tend to select most blameworthy conduct as most important causal factor). Still more support is provided by interview research showing that accident victims strongly associate the two. Whether the victims identify themselves or others as the cause of the accident, more than 85% attribute fault to the person identified as the cause. HENSLER ET AL., *supra* note 92, at 153-54.

An additional theoretical justification for conflating attributions of causation and responsibility is that the social context may make the causal attribution tantamount to an attribution of responsibility. That is, jurors are likely to make causal attributions with the socially governed consequences—a judgment of responsibility and liability—in mind. *See* Lloyd-Bostock, *Attributions, supra* note 15, at 272-73, 275; *see also* Shultz & Schleifer, *supra* note 153, at 56-57 (discussing close connection between judgments of causation and responsibility).

A particularly interesting discussion for the present purposes of the distinction between attributions of causation and responsibility is V. Lee Hamilton, *Intuitive Psychologist or Intuitive Lawyer? Alternative Models of the Attribution Process,* 39 J. PERSONALITY & SOC. PSYCHOL. 767 (1980). Hamilton argues that subjects in the classic experiments cited to support the attribution error phenomenon (*see supra* notes 183-84 and accompanying text) can be considered to have committed error only in terms of the model of scientific reasoning about causes. These subjects, however, may have been acting not as "intuitive psychologists" but instead as "intuitive lawyers," and thus have understood the experimental question to require the attribution of responsibility instead of the explanation of causation. Attributions to the person rather than to the circumstances in these cases are "fully plausible as assessments of responsibility," Hamilton argues, because the actors in the experiments could have acted otherwise. Hamilton, *supra,* at 770; *cf.* Tetlock, *supra* note 49, at 360-61 (arguing that overestimating dispositional attributions makes sense if people are

Thus, the fundamental attribution error should lead jurors to attribute both the cause of and the responsibility for an accident to someone's fault rather than to the circumstances: accidents don't happen unless someone is negligent.[194] The question jurors in a negligence case are actually asked to confront is: Who, if anyone, is responsible for the accidental injury? But given the fundamental attribution error, jurors may reformulate this question as: Who among the

"intuitive politicians who have incentives to hold others strictly accountable for their conduct").

Hamilton's analysis may be sound with respect to intentional behavior, which was the context of the experiments referred to, and to the "correspondent inference" theory of attribution on which she draws. Hamilton, *supra,* at 769-70; *see also* FISKE & TAYLOR, *supra* note 40, at 26-32 (discussing work of Jones and Davis on correspondent inferences). According to Heider, at the fourth level of responsibility, people are held responsible for the consequences they voluntarily bring about unless there is a sufficient external justification. Hamilton, *supra,* at 770. But Hamilton's critique of the fundamental attribution error does not apply to the negligence case, in which the test is not solely whether the actor could have acted otherwise, but whether he *should* have. Thus, Hamilton's observation that "[t]he fact that everyone else acted the same way in response to the experimenter's instructions [in an early attribution error experiment] is . . . useful causal information but is less relevant morally or legally," *id.,* is not germane, because in the negligence case, distinguishing a party's behavior from what others would have done is very important, if not dispositive, for a finding of responsibility. *See supra* notes 189-92 and accompanying text (discussing jury's task of comparing a party's behavior to that of a "reasonable person").

194. Negligence law recognizes a class of cases in which the defendant's fault may be implied from the mere fact of an accident: res ipsa loquitur. The first element of res ipsa requires that the accident be of a kind which ordinarily does not occur without negligence. KEETON ET AL., *supra* note 1, § 39, at 244-48. (The other elements, that the instrumentality of the accident be within the defendant's exclusive control and that the plaintiff not contribute to the accident, do not concern us here.) But what distinguishes the cases that meet this criterion from those that do not? None of the usual doctrinal interpretations of "does not ordinarily occur without negligence" accurately captures the only valid basis in probability theory for inferring negligence from the fact of the injury: that the probability of negligence, given the injury, be greater than half. *See* David Kaye, *Probability Theory Meets Res Ipsa Loquitur,* 77 MICH. L. REV. 1456, 1460-67 (1979). The verbal vagueness and statistical incoherence of this element of res ipsa doctrine suggests that what divides the cases satisfying the element from the cases that do not is merely a rough distinction between the accidents people are expected to put up with in the absence of proof that the defendant is negligent (*e.g.,* falling while getting on a bus), and those, on the other hand, that stand out from the ordinary run of events (*e.g.,* the falling sack of flour, the exploding boiler). *But cf.* Mark F. Grady, *Res Ipsa Loquitur and Compliance Error,* 142 U. PA. L. REV. 887, 894-925 (1994) (using economic theory to explain why it is sometimes efficient for potential injurers not to comply perfectly with generally cost-effective standards of precaution; where rate of precaution needed to avoid accidents is especially high, likelihood of such "compliance errors" is also high, and hence it is likely that any accident resulted from negligence, making res ipsa appropriate). In any event, the cases studied in this Article do not appear to meet the standard definition of res ipsa. Res ipsa was not argued in the case of the gas explosion in *Hocon*; in *Butler,* the judge did not instruct jurors on res ipsa even though he speculated that res ipsa might be necessary to send the case to the jury without any evidence of how Butler fell (B. 64.4-22 (Apr.25,1990)).

parties before the court is responsible? Because the accident must have been caused by someone's carelessness, the jurors' task is simply to determine whose.[195] In contrast to jurors' use of the simulation heuristic, which is largely consistent with tort doctrine, and to the use of prototype theory, which is consistent to some extent with appellate law if not with the law given in instructions, this presumption that "someone's to blame" plainly conflicts with formal negligence law, which requires proof of fault.[196]

195. An argument that this schema may derive from the implicit context and purpose of juror decision-making, and not from cognitive bias or error, is suggested by CALABRESI & BOBBITT, *supra* note 7, at 53-79. They argue that as a society, we make a de facto "tragic choice" to let a certain large number of ourselves be maimed or killed in typical industrial and transportation accidents, because some such large number of injuries and deaths is inevitable as a statistical matter, given our methods of manufacture and transportation. In order to avoid confronting this choice collectively and explicitly, we (among other things) assign to juries the task of allocating the costs of, and thus responsibility for, these accidents. Because different groups of citizens sit on different juries, each ordinarily deciding responsibility for a single accident, the tragic choice is decentralized; and because we do not ordinarily require juries to give reasons for their decisions, the tragic choice is made aresponsibly. Both the decentralization and the aresponsibility allow us not to consider the cumulative tragedy as collectively chosen.

The fault standard for gauging liability facilitates this avoidance function because it makes the award of compensation hinge on an "absolute standard of worthiness" instead of a comparative judgment across cases. *Id.* at 62-63, 72-79. A victim recovers only if he can show that the defendant's conduct (but not his own, to an extent depending on the comparative negligence law of the jurisdiction) falls short of the standard. The victim deserves compensation only because the defendant acted wrongfully—not because our industry and transportation systems are designed, quite beyond the control of the individual parties, in a way that is bound to cause some great number of injuries. The fault standard is a "perfectible" standard because in each individual case, its application allows us to believe that if only no one had been at fault, no one would have been hurt; it is individual fault that brings about injuries, not the fact that society collectively has set up the game to injure large numbers of people, however carefully they act. CALABRESI, *supra* note 3, at 7 & n.33. And the proposition that if no one had been at fault, no one would have been hurt, logically implies that if someone was hurt, someone must have been at fault.

Thus, jurors' predilection to find someone at fault may be due not to the fundamental attribution error, but rather to the implicit context of their decision-making, which directs their attention to one sort of explanation for the accident rather than another. *See* Stephen W. Draper, *What's Going On in Everyday Explanation?, in* ANALYZING EVERYDAY EXPLANATION, *supra* note 17, at 15, 19 (the particular causal explanation expected depends on social context and purpose of question, which are not unambiguously conveyed by literal question itself). For a short, general discussion of the importance of purpose and context for attributions of responsibility, *see* Lloyd-Bostock, *The Ordinary Man, supra* note 15, at 160-65.

196. *See, e.g.,* KEETON ET AL., *supra* note 1, § 30, at 164-65 (describing elements of negligence cause of action). For classic statements in Connecticut law of the principle that negligence is not to be inferred from the mere fact of an accident, *see O'Brien v. Cordova,* 370 A.2d 933, 934-35 (Conn. 1976) (holding that trial court erred in not granting judgment notwithstanding the verdict to defendant because jury should not have been permitted to infer solely from occurrence of rear-end collision that defendant, the second driver, was

Both attorneys might be expected to take the "someone's to blame" schema into account when structuring their arguments. For example, the plaintiff's attorney might be expected to present a version of events in which the plausible causal candidates would be (1) the defendant and (2) the circumstances (*i.e.,* no one), so that the fundamental attribution error would bias attribution of responsibility toward the defendant. The plaintiff's attorney need not dwell on the defendant's breach of duty. Conversely, the defendant's attorney would not be inclined to rest with a purely defensive argument that her client's breach of duty had not been proven—that plaintiff's injuries were simply due to an unforeseeable accident. Instead, she might be expected to argue aggressively that her client behaved reasonably, in order to counter any attributional bias against her client.

(c) "He's That Kind of Guy"

Since jurors are prone to commit attribution error, who are they likely to hold responsible for an accident? The second and more obvious implication of the fundamental attribution error for juror decision-making in negligence cases is that jurors would be expected to attribute responsibility for the accident based on the perceived "sort of person" a party is.[197] The fundamental attribution error links be-

negligent); *Senderoff v. Housatonic Public Service Co.,* 156 A.2d 517, 519 (Conn. 1959) (holding that trial court erred in not granting directed verdict to defendant where plaintiff showed only that his electricity was shut off but presented no evidence that interruption in service was due to any fault of defendant's). It is somewhat ironic that the Connecticut Supreme Court in *O'Brien* chose to base its rule on the assertion that "[c]ommon experience shows that motor vehicle accidents are not all due to driver negligence." *O'Brien,* 370 A.2d at 934-35. The argument from cognitive psychology in this Article, and the very practical assumptions of automobile insurance claims adjusters, are to the contrary. *See* H. LAURENCE ROSS, SETTLED OUT OF COURT 98-99 (1970) (contrasting formal law of negligence with settlement practices of insurance claims adjusters, author observes that for adjusters, "if Car A strikes Car B from the rear, the driver of A is assumed to be liable and B is not").

197. The standard negligence instruction encourages jurors to ask whether each party is "the kind of person (who would act negligently)," because the instruction is phrased in terms of how the reasonable "person" would act. *Cf. supra* note 192 (how form of instruction as a comparison encourages fundamental attribution error). By also referring to the circumstances, the instruction (and other instructions on the relative nature of "ordinary care" and "quantum of care," *see* DEVITT ET AL., *supra* note 86, §§ 80.05-06, at 136, 138; *see also supra* note 28 (*Butler* negligence instructions)), might appear to avoid the fundamental attribution error. But the focus on the "reasonable person" (as opposed to, say, reasonable behavior) directs jurors' attention to the individual rather than the circumstances. *Cf.* Adrian Furnham et al., *Professional and Naive Psychology: Two Approaches to the Explanation of Social Behaviour, in* ATTRIBUTION THEORY AND RESEARCH, *supra* note 15, at 315, 320-21 (suggesting that attribution theorists may induce attribution error by asking subjects to infer the causes of other people's actions rather than the extent to which the

havior and traits. Although psychological research subjects infer traits from behavior, lawyers can exploit the connection in the other direction: *A* is a good (careful, deserving) person, and therefore could not be responsible for a bad outcome (the accident). This habit of thought, like the "someone's to blame" schema, is inconsistent with textbook negligence law, which focuses on the party's behavior under the circumstances, not on the party's enduring personality traits.

Attribution theory suggests that jurors may believe that the plaintiff, because he started the suit, is more aggressive and demanding, and that this aggressive stance is due to negative traits (hostility toward the defendant or greed) rather than to the demands of role (suing is how you get things done in the legal system); consequently, jurors may be biased against plaintiffs.[198] A similar anti-plaintiff bias

situation is causally relevant). Moreover, the instruction posits a stable personality, that of the reasonable person, which would exacerbate the tendency to attribute causation (and responsibility; *see supra* note 193) to enduring dispositions of the actor—to personality and attitude—rather than to the circumstances. Thus, the instruction may lead jurors to define fault differently than does standard tort doctrine, according to which negligence should be understood purely in terms of conduct, as the creation of unreasonable risks, and not as a state of mind. KEETON ET AL., *supra* note 1, § 31, at 169 (citing Henry W. Edgerton, *Negligence, Inadvertance and Indifference: The Relation of Mental States to Negligence,* 39 HARV. L. REV. 849 (1926); Henry T. Terry, *Negligence,* 29 HARV. L. REV. 40 (1915)).

198. *See, e.g.,* Michael Lupfer et al., *An Attributional Analysis of Jurors' Judgments in Civil Cases,* 125 J. SOC. PSYCHOL. 743, 743-45 (1985) (finding limited anti-plaintiff attributional bias in mock juror judgments of two civil suit scenarios: each actor's behavior more often attributed to his hostile intentions and subjects' negative stereotypes when actor was plaintiff than when actor was defendant).

Hans and Lofquist have also found some anti-plaintiff bias. Hans & Lofquist, *supra* note 9, at 94-95. Their interviews with jurors indicated that jurors are suspicious of tort claimants against business defendants; the prominent attitude is that plaintiffs don't deserve compensation, but are instead just greedy examples of a "litigation explosion." *Id.* This suspicion that plaintiffs suing business defendants in tort are simply greedy attributes jurors' behavior (suing) to an internal, enduring disposition (greed) rather than to circumstances (getting hurt as a result of the defendant's conduct), a good illustration of fundamental attribution error.

Hans and Lofquist pursue the question why jurors might believe in a litigation explosion that statistical research refutes. They argue:

> Litigation explosion rhetoric captured the public's (and jurors') attention because it resonated strongly with preexisting cultural standards of responsibility. Notions of the individual responsibility of the plaintiff and concerns about equity, particularly in comparisons between the juror and the plaintiff, . . . contributed to the proclivity of jurors to scrutinize the legitimacy of plaintiff claims.

Id. at 109-10; *see also* Hayden, *supra* note 9, at 108-09 (suggesting a popular, pejorative belief in contemporary litigiousness as an explanation for supposed "litigation explosion" of the mid-1980s, a belief that draws on three cultural norms: individualism, violated when plaintiffs seek unearned damage "rewards"; equality, violated when plaintiffs seek to team up with the state against defendants; and distributive justice, violated when plaintiffs seek to get state to redistribute wealth).

may result from "just world" theory: plaintiffs, by virtue of their role, must claim to be victimized, and jurors may need to protect a belief that bad things happen only to "bad" people,[199] obviously a case of fundamental attribution error.

More generally, jurors' tendency to commit attribution error would lead us to expect each lawyer to seek to persuade the jury that the other party is the sort of person who would be responsible for the accident, while his client is not. This strategy is well recognized in the literature of the psychology of legal argument and in the profession.[200]

For research on the effects on jurors' damage awards of their perceptions of a litigation explosion—in particular, that plaintiffs generally were receiving high damage awards—*see* Edith Greene et al., *Jurors' Attitudes About Civil Litigation and the Size of Damage Awards,* 40 AM. U. L. REV. 805, 816-17 (1991) (finding that mock jurors who believed damage awards in general were excessive tended to give lower awards, but also used information about large awards in other cases as a benchmark in calculating damages).

For evidence showing the absence of any pro-plaintiff bias among jurors (though not necessarily indicating an anti-plaintiff bias), *see* Clermont & Eisenberg, *supra* note 8, at 1137 (finding that, in federal trials, product liability and medical malpractice plaintiffs fare much better before judges than before juries; in other personal injury cases, plaintiffs win at about the same rate before both judges and juries).

199. Lupfer et al., *supra* note 198, at 744; *see also* Melvin J. Lerner, *The Desire for Justice and Reactions to Victims, in* ALTRUISM AND HELPING BEHAVIOR 205 (J. Macaulay & L. Berkowitz eds., 1970) (explaining "belief in a just world": observers of apparently undeserved suffering will try to alleviate it, but if they cannot, they will either "defensively" blame victim for causing suffering or derogate her character, concluding that suffering was deserved after all); *but see infra* notes 264-66 and accompanying text (criticizing defensive attribution theory).

200. Saks & Kidd, *supra* note 15, at 136, make exactly this point. From the representativeness heuristic comes the "illusion of validity" that results from internal consistency among inputs. The more the inputs (*e.g.,* aspects of defendant's character) seem "of a piece," the more confidence the naive judge will have in the accuracy of the inference from those inputs. In fact, "consistency" equals redundancy, which reduces the validity of the inference even as it increases subjective confidence in the inference. Hence, "[t]he skillful attorney may trade on this defect of intuition by trying to paint a consistent personality picture of a party to a case . . . ." *Id.*

For a recognition of this strategy in the case law, *see Visser v. Packer Eng'g Ass'n,* 924 F.2d 655, 659 (7th Cir. 1991) (Posner, J.) (affirming district court's grant of summary judgment and exclusion of affidavits of plaintiff's co-employees in age discrimination case):

> This part of the affidavits [proffered by Visser] is amateur psychoanalysis. . . . They do not report primary facts from which a reasonable person in [affiants'] position would infer that one of Packer's motives was to deprive Visser of most of his pension. They construct a psychological model of Packer and deduce from it that he must have wanted to do Visser out of a pension. He was that kind of guy. This is the kind of argumentation one expects in a closing argument.

For analogous evidence of jurors' commission of the fundamental attribution error in criminal cases, *see* Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide Guilt,* 9 LAW & HUM. BEHAV. 37, 45-46 (1985) (discussing how evidence of criminal defendant's prior crimes

First, each lawyer would be expected to deemphasize his client's contribution to the outcome and to emphasize the contribution of everything else, including the other party's behavior. Following the availability heuristic, the less salient the client's contribution, the more salient the other causal candidates will be.[201]

Second, we would expect the lawyers to construct suitable personality profiles for the parties. This is similar to constructing person-situation prototypes to show reasonableness under the circumstances and fitting the evidence to those prototypes; the difference here is that the profile extends to the person in general, and not only to her conduct in circumstances like those leading up to the accident. Attorneys would be expected to develop stock characters and scripts of reasonableness or its opposite, and to try to fit what the jurors know of the client (or the opposing party) into those characters and scripts.[202]

Evidence and strategy partially constrain the arguments lawyers can make about the kind of person a party is. Information about how a party has behaved in other, unrelated circumstances ought to be irrelevant to responsibility for the incident at bar.[203] The evidence in the trial may also not supply enough, or perhaps any, data from which jurors can formulate the prototype of due care in similar situations to which the parties will be compared.[204] It may also be a risky strategy for defense counsel to blame the victim explicitly, because of jurors' tendency to sympathize with the injured party.[205]

So, as with other cognitive devices, we would expect to find efforts to evoke attribution error implicitly. Through metaphoric construction of a prototype, the attorney can depict the "reasonable

leads jurors to generalize about defendant's negative characteristics, and therefore, increases likelihood of guilty verdict).

201. Note the potential conflict between a defense strategy shifting focus away from the defendant as protagonist to make the defendant less salient and thus to minimize the adverse effects of attribution error, and one emphasizing the defendant's reasonableness, to counteract the implicit fault schema. Defense counsel in *Giulietti*, for instance, reconciles the two by stressing the decedent's lack of care. *See supra* notes 123-24 and accompanying text.

202. *See* CANTOR & KIHLSTROM, *supra* note 44, at 100-07.

203. The actor's own past conduct, however, may indicate his knowledge of the risk and of appropriate precautions. KEETON ET AL., *supra* note 1, § 33, at 195-96.

204. Evidence of custom may, of course, be introduced, as it is in *Giulietti* to show the railroad's lack of care.

205. *See* HANS & VIDMAR, *supra* note 8, at 136 (observing that jurors in civil trials are commonly believed to be sympathetic to accident victims). *But cf. id.* at 134-35 (noting that role of sympathy may be overstated, citing Kalven and Zeisel's research that only about 4% of criminal juries differed in their verdicts from judges because of sympathy for defendant); *supra* note 198 (evidence concerning "blame the victim" attitude).

person." The more striking and apt the metaphors and analogies, the more available they will be to the jurors.

Third, to reduce the client's perceived responsibility for the accident, the lawyer might be expected to induce jurors to identify with the client. Research suggests two reasons why identification with the client would tend to counteract unfavorable attribution effects. First, getting the observer to adopt the actor's perspective enhances the salience of circumstances and other people's conduct as opposed to that of the actor, making an attribution to someone or something other than the actor more likely.[206] Second, to the extent jurors identify with a party, they are less likely to attribute negative dispositions to the party, perhaps because of empathy.[207] Identification may also promote jurors' sympathy for the plaintiff, while avoiding both the rules against and the strategic risks of an explicit appeal to sympathy.[208] Plaintiffs' attorneys in particular might be expected to try to get jurors to identify with their clients in order to counteract any propensity to

206. The "actor-observer effect" is the tendency to ascribe our own behavior to situational factors but the behavior of others to their enduring dispositions. For the original research, *see* Edward E. Jones & Richard E. Nisbett, *The Actor and the Observer: Divergent Perceptions of the Causes of Behavior, in* ATTRIBUTION: PERCEIVING THE CAUSES OF BEHAVIOR, *supra* note 143, at 79; *see also* FISKE & TAYLOR, *supra* note 40, at 72-75; NISBETT & ROSS, *supra* note 13, at 122-27; Holyoak & Gordon, *supra* note 44, at 53; Sherman & Corty, *supra* note 43, at 216. *But cf.* Shelley E. Taylor & Susan T. Fiske, *Point of View and Perceptions of Causality,* 32 J. PERSONALITY & SOC. PSYCHOL. 439 (1975) (explaining that causes are often attributed to most salient source of information; observers attributed causation to actors, but did not extend attribution to actors' dispositions).

See also Lind & Ke, *supra* note 21, at 239-40 (by getting jurors to adopt perspective of client, attorney makes it more likely that jurors will recall details available to that party). *But cf.* Susan T. Fiske et al., *Imaging, Empathy, and Causal Attribution,* 15 J. EXPERIMENTAL SOC. PSYCHOL. 356 (1979) (noting that observers who are induced to empathize with actor and to adopt actor's perspective on events are biased in their recall of details toward those available to actor, but are not significantly biased in their attributions of causality).

207. *See* DAVID L. HERBERT & ROGER K. BARRETT, ATTORNEY'S MASTER GUIDE TO COURTROOM PSYCHOLOGY 1028-29 (1980) (identification with litigants is associated with capacity to empathize, which is facilitated by people's ability to understand other persons by projecting their understanding of and acquaintance with their own behavior onto others); Ostrom, *supra* note 42, at 11; Green, *supra* note 15, at 254-55 & n.16 ("To the extent that the respondent enacts roles which subject him potentially to the same loss as the plaintiff, he is likely to identify with the plaintiff and to award him the verdict.") (citing research showing that, of subjects responding to mock negligence scenario in which four-year-old drowned, parents, women, people aged 30-44, and those in child-centered occupations tended to favor plaintiff).

208. An explicit appeal to sympathy is legal error, often reversible. TANFORD, TRIAL PROCESS, *supra* note 15, at 381-82; J. Alexander Tanford & Sarah Tanford, *Closing Argument Procedure,* 10 AM. J. TRIAL ADVOC. 47, 128-31 (1986) (inviting jurors' sympathy is an error of intermediate seriousness, sometimes requiring reversal). Too overt an appeal to sympathy might also be poor strategy, because jurors might think: "If that's all the plaintiff has to go on, the legal case must be very weak."

blame the victim. Conversely, to increase the other party's perceived responsibility, a lawyer might try to get the jurors to identify with the prototype to which the lawyer unfavorably compares that other party.[209]

(2) Fundamental Attribution Error in the Arguments

(a) Argument Structure

In *Butler,* the organization and emphasis of the argument for the plaintiff makes sense only in terms of the "someone's to blame" schema, because Butler's attorney spends very little time on either causation or breach.[210] Such an argument could persuade jurors of the defendant's liability only if they were ready to "fill in the blanks" with an implicit schema that included both causation and breach. The defense attorney's argument also reflects an awareness of this schema. After pointing out that the plaintiff is required to prove duty, breach, and causation,[211] Revere's lawyer does not rest with a merely defensive argument that the plaintiff did not satisfy his burden, but also argues that it was Butler's duty, not Revere's, to secure the load on the truck.[212]

(b) Attributing Responsibility to Dispositions

Sometimes lawyers rather blatantly show that they expect jurors to hold a person responsible for an accident because "he's that kind of guy." In *Fleming v. International Transport,*[213] Eileen Fleming was killed when she drove her car into a tractor-trailer that was pulling out from a loading dock onto the highway. Evidence showed that Fleming had been drinking alcohol, but it was unclear whether this affected her ability to stop her car in time to avoid the truck. Defense counsel, stressing Fleming's regular drinking habits and alluding to an affair she had had with a co-worker, said: "[D]espite her success, despite her achievements, Mrs. Fleming took chances in her personal life, with her

209. By getting jurors to identify with the standard to which the other party will be unfavorably compared, the attorney may take advantage of another attributional bias, the "false consensus" effect: people's tendency to see their own behavior and judgments as common and normal, and alternative conduct and judgments as uncommon and deviant. *See* Lee Ross et al., *The "False Consensus Effect": An Egocentric Bias in Social-Perception and Attribution Processes,* 13 J. EXPERIMENTAL SOC. PSYCHOL. 279 (1977).

210. *See supra* notes 98-101, 107-12 and accompanying text.

211. B. 31.22-32.1.

212. B. 32.2-34.13.

213. CV-88-0345211 (Conn. Super. Ct. Jud. Dist. of Hartford-New Britain at Hartford 1993).

professional life, members of her family . . . . And, she also took chances, chances operating a motor vehicle after drinking alcohol."[214]

In *Butler,* the plaintiff's lawyer both explicitly and implicitly invokes the fundamental attribution error throughout his argument. Butler "is the type of person, I think we all know now, he's going to give his best shot and he did,"[215] and "being the type of person he is," tries to put the tarp on the load himself.[216] When the lawyer comes to describe Brockway, the Revere employee who did not help Butler tarp the load, he says that "that kind of attitude . . . resulted in this injury."[217]

Perhaps more important is Butler's lawyer's implicit, metaphoric argument that "a guy like this couldn't have caused this accident; it's more likely that a guy like Brockway did." According to Butler's attorney, Butler is the protagonist on a difficult journey, with the jury and its favorable judgment as his destination.

This implicit argument consists of an interweaving of two metaphoric themes. The first is the *difficult journey.* The attorney repeatedly says that Butler has "gone through" severe difficulties in overcoming the physical and mental effects of the accident.[218] This

214. F. 792.17-22. Attorneys may also display their awareness of the fundamental attribution error by explicitly trying to counter their opponents' proffered attributions. In *Giulietti,* for instance, the railroad's attorney twice does this by separating the railroad as an entity with a general "disposition" from what may have happened in this particular incident. First, Giulietti's attorney had argued that fellow employee Ed Hines, and hence the railroad, was negligent for not putting on the emergency brake:

> [I]t was just training, the way he had been trained as a locomotive engineer, which is the Providence & Worcester Railroad will put you behind the seat and doesn't give you any formal instructions of how to run an engine and what to do in an emergency situation, so maybe you won't have the reflexes required to operate a train.

G. 500.3-501.19. This amounts to saying that jurors should consider the railroad negligent for this specific act because "that's the sort of company it is." The railroad's attorney explicitly calls the jurors' attention to his opponent's tactic: "[W]hat counsel is trying to do for the Plaintiff is to say that well, the whole railroad is on trial. The whole railroad is no good and that's why John is dead today." G. 518.10-13. Second, the railroad's attorney argues: "If the railroad has exercised reasonable diligence in the training of its employees . . . the fact that one man on that given night was not qualified, does not then mean that the railroad is negligent." G. 512.2-7.

215. B. 24.21-22.

216. B. 25.14-15; *see also* B. 28.23-24.

217. B. 27.21-22. Revere's lawyer, by contrast, does not explicitly play to the fundamental attribution error. A rule-oriented argument shapes his strategy: on carelessness, his argument is not that his client's employees did not breach their duty of care to help Butler but that they had no such duty; on causation, his argument is just that the plaintiff has no proof of how or why he fell.

218. B. 17.24, 20.2, 20.5, 21.7, 23.4, 23.5, 23.10, 29.6, 29.7, 29.18.

might sound like a mere cliché; but when combined with other images counsel evokes, its significance emerges. The attorney recalls Butler's own metaphor, from his direct examination, of striving "to reach a higher plateau."[219] This introduces an explicitly spatial image to the idea of "going through," suggesting not merely physical movement, but also movement toward a goal.[220] Finally, the attorney addresses the jurors: "Now, you hold his only chance. This is the last place, the only place he can come."[221] Indeed, the jurors themselves have "come" to this same place[222] and now must calculate compensation for Butler, a "very difficult" task paralleling Butler's own difficulties.[223] The metaphor of the jurors' decision at the end of the trial as a spatial location neatly unifies Butler's metaphoric journey, through his impediments and frustrations, with the jurors' decision in his favor as the destination of the journey.

The second theme is Butler as a *fighter.* The lawyer says that Butler "continues to fight"[224] and describes him as a "fighter."[225] The lawyer also notes that Butler will give a job "his best shot."[226] Also, "he's worked as hard as he can to get to this point," referring to the mental and physical skills he partially recovered under rehabilitation after the accident.[227] And, like an underdog pugilist, Butler has "beaten all the odds."[228]

Put together the *fighter* with the difficult *journey* and the result is *Rocky*: Sylvester Stallone running up the museum steps.[229] One can almost hear the theme song from the movie in the background.[230] The

219. B. 17.25-18.2, 23.13.

220. *See also* B. 21.5 ("he's gotten to the point").

221. B. 30.6-7.

222. The jurors' own metaphoric journey to their final decision is strongly suggested in one passage in which Butler's lawyer contrasts Butler's faulty memory since the accident with "our" ability to "remember about what happened to us and where our history is and where we come from as people." B. 20.9-11. I thank Richard Sherwin for the observation that the metaphor of journeying may be overdetermined, with many target domains.

223. *Compare* B. 30.5 (jurors' task) *with, e.g.,* B. 18.13-15 (Butler's difficulties).

224. B. 17.25.

225. B. 22.13, 23.15.

226. B. 24.22.

227. B. 29.14-15.

228. B. 17.24. The fighter metaphor would also tend to counteract any anti-plaintiff bias derived from the perception of plaintiff as demanding and complaining. *See supra* note 198 and accompanying text.

229. ROCKY (United Artists 1976).

230. Note how even such details as the lawyer's description of Butler's morning routine, explicitly relating how Butler's memory has been impaired by the accident (*e.g.,* B. 20.7-24), implicitly recall the beginning of a similar scene from *Rocky,* in which the hero wakes up before dawn and goes through his routine, drinks the raw eggs, and so on.

implicit reasoning in *Butler* is that the plaintiff is an underdog hero who deserves to be compensated for his unfortunate injury because of the sort of person he is. Metaphor merges Butler with the prototype, effacing the actual classification process required for the implicit argument to succeed.[231]

(c) Modulating Attribution Error Through Juror Identification

One indication that advocates seek to induce jurors to identify with the client is the advocate's manipulation of point of view: in particular, the use of the second person and the inclusive first person plural. George Butler's attorney uses the second and first person plural to some extent to take advantage of the fundamental attribution error. When he greets the jurors by saying, "George Frederick Butler, he should be an inspiration for all of us. . . . [His effort is] something we should all aspire to and . . . we hope we all do . . . ,"[232] he seeks to establish a general commonality among the jurors, Butler, and himself. When he describes Butler's headaches as "[n]ot the typical kind of headache where you and I can take two aspirins," he again invites the jurors to identify with Butler in order to understand Butler's injuries.[233] Butler's lawyer also equates the jurors' "difficult task" in deciding the case with Butler's own difficulties in overcoming the effects of the accident,[234] and just as Butler "give[s] his best shot," so he tells the jurors that "I have full confidence you'll make your best effort" to calculate damages.[235]

Revere's attorney uses the second person and first person plural in his one sustained narrative, the story of the refrigerator-freezer

231. Butler's attorney uses many other metaphors, although none are as sustained or significant as the *Rocky* theme. For instance, Brockway, the defendant's employee, "didn't lift a finger" to help Butler with the canvas (B. 26.20-21), a cliche that contrasts nicely with Butler's struggle to manipulate the heavy tarpaulin.

Not all of Butler's attorney's metaphors are felicitous. One that rings hollow is his description of Butler as formerly a "free spirit" who had "white line fever" (B. 22.21-22), in contrast to his present debilitated state. This doesn't work because we know that Butler didn't just drive his rig wherever he pleased, but was always instructed to go "from Point A to Point B," as the lawyer now calls it. B. 22.23. Indeed, the lawyer elsewhere praises Butler for always following instructions and doing his job. *E.g.*, B. 24.21-22. The reference to "free spirit" also seems to conflict with the lawyer's description of Butler as "the marrying kind." B. 29.24.

232. B. 17.14-24.

233. B. 21.24-25.

234. *See supra* note 97 (attorney identifying jurors with his client).

235. *Compare* B. 24.22 (Butler) *with* B. 30.23 (jurors). Although Butler's attorney uses the second and first person plural extensively when describing Butler's injuries and the jurors' tasks, he does not do so when describing the accident itself.

mover, designed to establish Revere's lack of duty.[236] "We call a repair person. . . . [He puts the freezer on his truck] and then you walk away. You go back about your business. It isn't your job to secure or do anything further with respect to that load."[237] This story features the attorney's most concentrated use of the second and first person plural in his entire argument,[238] and the only occasion on which he associates mostly active verbs with the second person.[239] This may be understood as a way of encouraging jurors to identify with Revere, and thus to think in attributional terms: Revere's employees aren't such bad fellows; they acted just as I would have if someone came to take my refrigerator in for repairs. I wouldn't be responsible if the driver of the truck, after I helped him carry the refrigerator out and load it onto the truck and after I went back about my business, happened to fall from the truck for an unknown reason; so why should the defendant?[240]

The *Giulietti* arguments reveal a more complex, multi-level use of language to enhance jurors' tendency to allocate responsibility by making the fundamental attribution error. John Giulietti's lawyer uses the second person and first person plural points of view, verb tense, and metaphor to lead the jurors to identify with John Giulietti as the passive victim of the railroad. On more than a third of the occasions on which Giulietti's lawyer addresses the jurors as "you" (or includes himself and the jurors as "we"),[241] including the most sustained instances (multiple instances in consecutive lines of transcript), he

236. B. 33.22-34.13; *see supra* notes 29, 113-14 and accompanying text.

237. B. 33.25-34.8.

238. Thirteen instances in 17 lines, or 19 per page, as opposed to 3.2 per page in the rest of the argument.

239. In this passage, 67% (6 of 9) of the verbs associated with the second person or first person plural are active, as opposed to 50% concerning the jurors' consideration of evidence and 11% (at most) concerning their decision-making task.

240. The second person also engages the jury in imagining the story. This analogy, after all, is not evidence; it's not the testimony on which, as counsel has commanded, the jurors "must . . . wholly and solely" base their verdict (*see supra* note 106 and accompanying text for Revere's attorney's exhortations to the jurors to *construct a verdict* from the evidence). So the strategy of engaging the juror in the story does not conflict with Revere's attorney's general strategy of not encouraging the jury to participate actively in evaluating the case.

It may be noted that the sexism of Revere's attorney's analogy (B. 34.2-4: "I wouldn't expect one of you ladies to help him, but one of the gentlemen being at home might willingly assist that driver . . . .") may have undercut the intended effect of the analogy on women jurors. (I owe this observation to students in my jurisprudence course, fall 1993; notes on file with author.) In fact, all six jurors were women. (Interviews with Butler's attorney on Nov. 18, 1993; notes on file with author.)

241. These constitute 36 of 94 total instances, or about 38%. This is counsel's most common use of the second person and first person plural.

places the jury in John Giulietti's shoes as the events unfold.[242] In all of these cases, counsel uses the present tense with the second or first person plural point of view, heightening jurors' sense of participation in the events.[243] Counsel then combines the second person and present tense with metaphoric reconstructions of the events. The railroad, Giulietti's attorney argues, "will put you behind the seat" without adequate training.[244] The gap between track one and the main line "begins to narrow on you."[245] Here the attorney attributes agency to an inanimate, fixed physical fact (the space between the two tracks), emphasizing that Giulietti was victimized by forces beyond his control, and at the same time placing the jurors in Giulietti's shoes.[246]

Giulietti's lawyer also uses the second and first person plural to invite jurors to identify with particular standards of reasonable care which Hines (Giulietti's fellow employee) and the railroad did not meet.[247] For instance, arguing that the railroad did not train Giulietti adequately to assume the conductor's job that night, counsel contends that "you don't throw men out to learn for themselves in the middle of the night. You should instruct a conductor . . . ."[248] Or, arguing that Ed Hines and hence the railroad imprudently planned the move of the cars, he says: "[I]f you have two cars, you can stop a two-car train a lot quicker than an eleven-car train."[249]

The railroad's attorney, similarly, uses the second and inclusive first person plural to get the jurors to identify with prototypes of reasonable care that John Giulietti did not meet. This takes two forms. First, the railroad's lawyer uses the second person when constructing analogies aimed at helping jurors understand the standard of care

242. *E.g.*, G. 501.15-25, 502.1-8, 502.17-24, 504.17-21, 505.9-11.

243. It is noteworthy that aside from these two uses of the present tense, Giulietti's attorney uses the past tense almost exclusively. *See infra* notes 288-89 and accompanying text (referring to Amsterdam and Hertz's discussion of verb tense).

244. G. 501.15.

245. G. 505.10-11.

246. Meanwhile, the railroad acts impulsively, not carefully: The trainmaster "thr[e]w" the men onto the job (G. 489.2); *cf.* "assigned" (G. 488.10, 489.7, 493.10); "sent out" (G. 489.15, 496.6). Ed Hines "shove[d]" the train (G. 500.1, 500.3). *Cf.* Elizabeth F. Loftus & John C. Palmer, *Reconstruction of Automobile Deconstruction: An Example of the Interaction Between Language and Memory,* 13 J. LEARNING & VERBAL BEHAV. 585 (1974) (use of more concrete, vivid words such as "smashed" to describe auto collision led subjects to estimate cars' speed at point of collision as greater than when accident described using verbs "collided," "bumped," "contacted," or "hit").

247. G. 487.23, 489.2-7, 497.7-10, 498.11-13, 500.21, 503.7-11. These total 17 occasions, or 18% of all instances of counsel's use of the second or inclusive first person.

248. G. 489.2-7.

249. G. 498.11-13.

which Giulietti did not meet.[250] He argues that "[y]ou people in your daily lives" wouldn't undertake something the jurors knew they weren't capable of doing, as John allegedly did.[251] And he introduces another explanation by saying, "[w]e talk about driving a car," to make the point that jurors know to exercise greater caution at uncontrolled intersections and in strange places.[252]

The railroad's lawyer also uses the second person to equate the jurors' present responsibility to decide the case with Giulietti's past responsibility to decide to be the conductor. "The responsibility is yours, ladies and gentlemen. In this country, the responsibility of people for their own negligent acts . . . lies with that person."[253] In this striking passage, echoed later,[254] the railroad's attorney explicitly empowers the jurors to decide the case[255] (instructing them to use "judgment" rather than "innuendo" and "hindsight"[256]). And by using the same word, "responsibility," to describe Giulietti's situation, he implicates the proposition: you can decide responsibly; therefore, so could have Giulietti (and he didn't).[257] The attorney thus implicitly encourages the jurors to attribute fault and responsibility for the accident by

250. These amount to 38 out of 179 total occurrences of the second or first person plural in the railroad's counsel's argument, or about 21% (compare 18% figure for Giulietti's counsel's uses of second or first person plural to describe standard of care which railroad did not meet).

251. G. 515.8-13. The railroad's attorney makes the same point later by putting the jurors in Giulietti's place. G. 522.11-16.

252. G. 517.11-25.

253. G. 511.6-17.

254. G. 519.2-4 ("responsibility" used three times in three lines of transcript), 521.21-22.

255. *See infra* notes 285-313 and accompanying text (noting how attorneys may engage jurors as active decision-makers).

256. G. 511.17-18.

257. The flip side of this strategy is that the railroad's attorney uses the second or first person plural to equate the jurors' own imperfect conduct in everyday life with Ed Hines's imperfect performance on the fatal night. "Someone can say Ed should have done this, Ed should have done that. There are a lot of things we should have done." G. 514.20-22. This device builds on counsel's initial attribution of "common sense" to the jurors and his injunction that they use common sense as opposed to "20/20 hindsight" and the like. G. 509.21-510.3. Such hindsight occurs when one second-guesses "judgment calls." G. 518.18-19, 518.23-25, 522.25-523.7.

But this is a risky rhetorical strategy. The railroad's attorney is trying to persuade the jury that when they analyze the defendant's conduct, they're "second-guessing," using "20/20 hindsight"; that when the decision could have gone either way, that's a "judgment call," not negligence. G. 523.7. Yet at the same time, the attorney wants the jury to do precisely this with respect to Giulietti's behavior. It is unclear whether he avoids this apparent contradiction through his attempted metaphoric distinction. *See supra* notes 128-36 and accompanying text.

identifying themselves with a standard of behavior and contrasting themselves with the behavior of the decedent, John Giulietti.

F. The Severity Effect: The Seriously Injured Deserve Compensation

Jurors are likely to believe that one who accidentally causes serious harm is more at fault, and not just liable for greater damages, than one who causes less serious harm. Thus, by emphasizing the severity of the plaintiff's injuries, the plaintiff's attorney bolsters her argument that jurors should find the defendant responsible in the first place.

(1) Research on the Severity Effect

Cognitive psychological research shows that information about the extent of an accident victim's injuries may affect judgments about causality and responsibility. In an early, often-cited experiment, Elaine Walster presented two groups of subjects with nearly identical scenarios. In both, a man left his car parked on a hill, and after he left, the car rolled down the hill. One group was told that the car hit a tree stump; the other was told that the car struck and injured a person. The second group found the car owner more responsible for the accident than did the first group.[258]

Data concerning the severity of the consequences cannot affect the overall judgment of responsibility if the decision-makers observe the demarcations between the doctrinal categories of breach, causation, and injury. Strictly speaking, the extent of the injury should be irrelevant to the determinations of fault and causation, although relevant to the measure of damages.[259] Yet Walster's subjects "bent" their

258. Elaine Walster, *Assignment of Responsibility for an Accident*, 3 J. PERSONALITY & SOC. PSYCHOL. 73, 77 (1966); *see also* Loftus & Beach, *supra* note 49, at 946. Nisbett and Ross cite Walster's research as an instance of the "vividness criterion": how people weigh vivid information more heavily than relatively pallid information in making inferential judgments. In Walster's study, the second scenario is more vivid than the first due to the observer's emotional interest in its consequence, an injured person. Therefore, experimental subjects weighted that consequence differently in judging responsibility. The vividness criterion is partly explicable by means of the availability heuristic: vivid information is more likely to be recalled and hence more likely to be used in inferences. *See* NISBETT & ROSS, *supra* note 13, at 43-62. FISKE & TAYLOR, *supra* note 40, at 254-57, question the empirical support for the "vividness criterion."

259. Marylie Karlovac and John Darley have shown that mock jurors use the Learned Hand calculus of risk in judging responsibility: the more serious the possible accident, the more irresponsible the person who risked it by his actions. Karlovac & Darley, *supra* note 2, at 313-14. But *possible* outcome is not necessarily the same thing as *actual* outcome. The Learned Hand calculus uses the former to set a standard for responsibility; the severity effect, by contrast, concerns the impact of the latter on judgments of responsibility. For the most part, Karlovac and Darley did not investigate the effect of severity of outcome on

judgments toward a more global conception of responsibility for the accident, a prototype in which responsibility increases as the consequences become more serious.[260] This may be called the "severity effect."[261] And because a judgment of responsibility by jurors in an accident case leads to a decision that the tortfeasor must compensate the victim, the severity effect should mean in practice that the very seriously injured are more likely to receive compensation.[262]

The severity effect has been the subject of considerable psychological research. Most of this work has been done to test one explanation for the effect, the "defensive attribution" hypothesis. The logic of defensive attribution is that attributing the cause of an accident to mere chance, *i.e.*, to the circumstances, is threatening to the observer because such an accident could just as well befall the observer herself. In contrast, "[s]eeing the [more serious] accident as avoidable and blaming someone for its occurrence makes the action more predictable and hence avoidable by the self."[263] Hence, blame is attributed "defensively." If the victim injures himself, the tendency is to blame the victim. But if the injurer is someone other than the victim, as would be the claim in any lawsuit, the judgment is that one who inflicts serious injuries is more responsible than one who inflicts minor damage.

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responsibility judgments. *Id.* at 315-16. Note that according to the hindsight bias (*see* Fischhoff, *Heuristics, supra* note 193; Fischhoff, *Outcome Knowledge, supra* note 193), the occurrence of a severe injury may lead individuals to think that the actor should have foreseen the severe injury. Thus the severity of the injury enters the calculus of risk post hoc: the more serious the (expected) injury, the greater the precautions the actor should have taken.

260. Walster, *supra* note 258. Note that Walster's subjects were not given the standard negligence instructions, and therefore could not have been expected to analyze the problem in rule-element fashion. Instead, they were asked to evaluate the actor's degree of carelessness and their own moral strictness in evaluating what the actor did. *Id.* at 75-76.

261. At least in some circumstances, the severity of the injury may correlate with expert judgments of responsibility. *See* PATRICIA M. DANZON, MEDICAL MALPRACTICE 20-22 (1985) (reporting findings of 1974 California Medical Association and California Hospital Association study, in which four experts in legal medicine investigated 970 instances of iatrogenic injuries in the health care system and determined that the more severe the injury (not including fatalities), the greater the likelihood of the attribution of the injury to negligence).

262. *Cf.* CHIN & PETERSON, *supra* note 13, at 42-43 ("deep pocket effect" found only when plaintiffs seriously injured); LOFTUS & BEACH, *supra* note 49, at 946-47. *But cf.* Sally M. Lloyd-Bostock, *Common Sense Morality and Accident Compensation, in* PSYCHOLOGY, LAW AND LEGAL PROCESSES 93 (David P. Farrington et al. eds., 1979) [hereinafter Lloyd-Bostock, *Common Sense Morality*] (accident victims do not equate fault and duty to compensate; moreover, even when fault and compensation correlate, victims may first perceive a right to compensation and then attribute fault to justify it).

263. FISKE & TAYLOR, *supra* note 40, at 85.

The severity effect is the least robust of the cognitive psychological principles discussed in this Article. It has thus far received only limited support from mock juror research.[264] Two studies have failed to replicate Walster's results, finding no significant correlation between the severity of the plaintiff's injuries and the level of the defendant's perceived responsibility.[265] And numerous researchers have debated both the empirical support for and the conceptual coherence of defensive attribution.[266]

Assuming, however, that the severity effect is real (regardless of whether the defensive attribution account of it is valid), we would expect to see victims' or plaintiffs' lawyers seeking to invoke it in order to trigger an attribution of greater responsibility for the accident. Plaintiffs' lawyers would be expected to use argument structure, descriptiveness, metaphor, and other rhetorical techniques to make their clients' injuries as conspicuous for the jurors as possible, and defendants' lawyers would be expected to attempt the opposite.

264. "Jury research provides mixed evidence for an association between the severity of an injury and liability." MACCOUN, GETTING INSIDE, *supra* note 11, at 29-36.

265. *See* Green, *supra* note 15, at 246-47 (noting that the seriousness of injury does not affect outcome when defendant's precautions are arguably inadequate); Ewart A.C. Thomas & Mary Parpal, *Liability as a Function of Plaintiff and Defendant Fault,* 53 J. PERSONALITY & SOC. PSYCHOL. 843, 851-52 (1987) (showing that defendant's responsibility is unrelated to severity when defendant did not intend to harm plaintiff or could not have foreseen the harm). Note, however, that this situation does not appear to reach cases such as those examined in this Article, in which the defendant's conduct is at least arguably negligent.

266. *See, e.g.,* Fincham & Jaspars, *supra* note 15, at 85-90 (criticizing the theory on both grounds); Glenda Y. Nogami & Siegfried Streufert, *The Dimensionality of Attributions of Causality and Responsibility for an Accident,* 14 EUR. J. SOC. PSYCHOL. 433 (1983) (describing how causality attribution increases with severity of outcome but responsibility attribution decreases); E. Jerry Phares & Kenneth G. Wilson, *Responsibility Attribution: Role of Outcome Severity, Situational Ambiguity, and Internal-External Control,* 40 J. PERSONALITY 392, 400-01 (1972) (observing that responsibility attribution increases with severity of outcome only in "high structure" scenarios in which it is clear who is responsible; when conditions are ambiguous, there is "virtually no relationship" between responsibility attribution and outcome severity); Neil Vidmar & Linda D. Crinklaw, *Attributing Responsibility for an Accident: A Methodological and Conceptual Critique,* 6 CANADIAN J. BEHAV. SCI. 112 (1974) (criticizing research that supports defense attribution theory).

In support of defensive attribution theory, *see, e.g.,* FISKE & TAYLOR, *supra* note 40, at 84-86 (noting "equivocal" empirical support for the theory but acknowledging its importance); SHAVER, *supra* note 15, at 133-36 (general defense of theory); Jerry M. Burger, *Motivational Biases in the Attribution of Responsibility for an Accident: A Meta-Analysis of the Defensive-Attribution Hypothesis,* 90 PSYCHOL. BULL. 496 (1981) (supporting defensive attribution and explaining apparent conflict in experimental results as due to varying degrees of observer identification or similarity to perpetrators or victims, and in terms of varying subject involvement).

Observe that utilizing the severity effect also allows the plaintiff's attorney to appeal to jurors' sympathy implicitly, through the description of the evidence and the client.[267] Conversely, the defendant's lawyer cannot too blatantly minimize the plaintiff's suffering, because this would undermine the image of the reasonable and sympathetic lawyer that she is attempting to invoke.[268] But the defendant's attorney can try to minimize the severity of the injury through less obvious means.

(2) The Severity Effect in the Arguments

In *Butler,* George Butler's lawyer makes his client's suffering conspicuous for the jury through argument structure and, to a lesser degree, by use of the second person and first person plural. The organization of the argument seems designed to take advantage of the severity effect.[269] The description of Butler's medical treatment and his injuries begins right after the introduction and occupies, together with the damages discussion, well over half the entire argument. Revere's attorney, by contrast, spends as little time as possible on injury, quickly admitting that the medical evidence is not disputed. Instead, he argues duty, causation, and a controverted point of evidence.

Butler's lawyer also uses the second person and first person plural specifically to get the jury to understand George's suffering.[270] In the introduction, for example, he encourages jurors to identify themselves generally with him and with the plaintiff.[271] More specifically, in explaining that Butler's loss of work deprives him of friendships, the lawyer argues: "you meet people [at work] and you form associations with people you work with and that's [how] you get friends."[272] Finally, the lawyer's description of the jurors' task in measuring damages as "difficult"[273] parallels Butler's own difficult struggles.[274] All these rhetorical devices help make Butler's suffering more vivid for the jurors.

267. *See supra* note 208 and accompanying text (implicit appeal to sympathy).

268. *See, e.g.,* B. 31.15-16 ("I agree, Mr. Butler is a fine and admirable person. He deserves sympathy."); G. 509.19-20 ("[Y]ou feel sorry and indeed should feel sorry for this very tragic event.").

269. *See supra* notes 98-100 and accompanying text (organization of Butler's attorney's argument).

270. *See supra* notes 232-35 and accompanying text (Butler's attorney's use of second and first person plural to identify jurors with client).

271. B. 17.15-23.

272. B. 28.15-17.

273. B. 28.5-6, 30.5.

274. *See* B. 29.2-30.5.

In the *Giulietti* arguments, the severity effect helps explain another rhetorical device: Giulietti's attorney uses much more concrete language to describe the victim and the accident than does the railroad's attorney.[275] The plaintiff's lawyer refers to the decedent as "Johnny" or "John" throughout the argument. He says that Giulietti was "killed."[276] He observes that just before the accident, Giulietti had been "perched" on top of the train car.[277] Then Ed Hines heard "scratching and scraping noises" over the radio,[278] and Giulietti was "crushed."[279] "John died from a crush injury of his lower abdomen and chest."[280] The railroad's counsel, by contrast, eschews concrete description. He refers to decedent as "John Giulietti" or "Mr. Giulietti," occasionally as "John," but never as "Johnny." And he mentions "death" only once—to say that it was instantaneous and therefore that no pain and suffering damages should be awarded.[281] It should be noted that neither lawyer argues optimally in this regard; Giulietti's attorney occasionally neglects to describe events concretely and vividly, and the railroad's lawyer once lapses into vivid description of the decedent's body.[282]

Giulietti's lawyer also uses the second person and first person plural to invite jurors to identify with the plaintiff,[283] thus making the decedent's suffering more vivid. In contrast, the railroad's counsel's use of the second person leads the jurors not to identify with Giulietti, but instead to distinguish themselves from him.[284]

275. *See* Loftus & Palmer, *supra* note 246. For more extensive excerpts from Giulietti's lawyer's argument, *see supra* notes 117-19.

276. G. 490.3, 495.22, 495.24.

277. G. 501.21, 504.14.

278. G. 500.5, 500.7, 500.13, 505.25-506.5.

279. G. 505.23, 508.1.

280. G. 505.12-14; *see also* "massive crush injuries to his chest and lower abdomen." G. 507.19-20.

281. G. 523.24.

282. For instance, in Giulietti's lawyer's first narrative summary of the events, he misses the opportunity to describe the accident more graphically (G. 495.13-15). In his second narrative summary, he undercuts the graphic description of John's injuries by the legalese locution "as far as his lower extremities were concerned" (G. 505.15-16). And third, not until late in the closing argument (G. 505.23-506.6) does he explicitly state that the "scraping noise" Ed Hines heard was Giulietti being scraped against the trains on the main track. The railroad's lawyer, meanwhile, refers to "gruesome photographs" (G. 519.17) of Giulietti's body.

283. *See supra* notes 241-46 and accompanying text.

284. *See supra* notes 250-57 and accompanying text.

G. Cognitive Framing: The Performative Dimension of Juror Judgments

To understand how jurors determine responsibility for accidents, we must consider more than the law of negligence, the facts of the case, and the jurors' own intuitive habits of judgment. We must also consider how the jurors may approach their task. Attorneys strategically employ a range of linguistic devices to lead jurors to frame their role as active or passive decision-makers, and thus encourage them to award or discourage them from awarding damages.[285]

(1) How Rhetoric Reflects Cognitive Framing

In *An Analysis of Closing Arguments to a Jury,*[286] Anthony Amsterdam and Randy Hertz explore how a prosecutor and a defense attorney argue to the jury in an ordinary criminal case. Their discussion of *People v. Jones* focuses on whether the assailant intended to kill the victim he shot at close range during an argument; that will determine the choice between second-degree murder and manslaughter. Amsterdam and Hertz observe that even in a relatively simple case, and within the constraints imposed by the evidence, the substantive and the procedural law, and jurors' expectations about what closing arguments should sound like, advocates can construct very different stories about identical events. Moreover, each story is inseparable from the way it is told: it is through particular linguistic devices

285. In the literature of decision theory, "cognitive framing" refers to how the description of possible outcomes affects people's choices among those outcomes. For instance, describing a prospective set of outcomes in terms of gains generally leads people to be risk-averse, *i.e.,* to prefer a certain gain to the chance (objectively equal or greater in value) of a larger gain; describing the mathematically identical set of options in terms of losses, on the other hand, leads people to seek risk, *i.e.,* to prefer a chance of no loss to a certain loss, even at the risk of suffering a larger loss. In one famous experiment, an imminent flu epidemic was postulated to put 600 lives at risk. Subjects confronted with a choice between a vaccination program that would save 200 lives and one that would create a one-third chance of saving 600 chose the first program (risk-averseness). Yet these same subjects, confronted with a choice between a program that would result in 400 deaths and one that would create a one-third chance of no deaths (objectively the same two options as in the first phase of the experiment), chose the second program—a risk-seeking choice inconsistent with their earlier choice. *See* Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames,* 39 AM. PSYCHOLOGIST 341, 343 (1984); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice,* 211 SCIENCE 453 (1981).

The cognitive framing discussed in the text is broadly similar to Kahneman and Tversky's in that the attorneys' description of the jurors' task—how the job of deciding is framed—is hypothesized to affect how the jurors decide. Cognitive framing in Kahneman and Tversky's specific sense may also apply to juror decision-making; I have not explored that possibility in this Article.

286. Amsterdam & Hertz, *supra* note 20, at 55.

that the attorneys implicitly evoke their contrasting visions for the decision-makers.[287]

The basic contrast between the prosecution and defense arguments in *Jones* is between two distinct cognitive frames: history and dialogue.[288] The prosecutor tells a story about what happened on a New York City street on the date of the crime, inviting the jurors to accept those events as plain fact. She describes events in the past tense and speaks to the jurors as if they need only register the objective evidence of what happened "out there" in the world of fact.

The defense attorney, of course, wants to engender reasonable doubt in the jurors' minds. He cannot, however, do this explicitly; that would be contrary to the judge's instructions to the jury not to speculate. It would also play into the stereotype of defense attorney as trickster, and would undercut his ability to take advantage of the strict formal burden of proof. So defense counsel implicitly draws the jurors into an imagined dialogue in which they reconstruct the events of the crime, with the result that they implicitly understand those events not as given facts, but merely as possible interpretations, open to reasonable doubt. The attorney does this through a variety of techniques, including speaking of the jurors' consideration of the evidence and their decision-making tasks using active verbs and metaphors rather than passive ones, describing events in the present tense, and asking rhetorical questions.[289] Thus, defense counsel's closing argument tells a story, not about what happened "out there," but about what is happening at the trial itself: how the jurors reach their decision.[290] In sum, Amsterdam and Hertz argue that jurors frame the evidence differently when they conceive of themselves as constructing a decision through engaging in dialogue, as opposed to when they conceive of themselves as passive receptors for the "data" established at trial.[291]

287. *Id.* at 58.

288. *Id.* at 75-77.

289. *Id.* at 83-104.

290. *Id.* at 58. Specifically, Amsterdam and Hertz argue that the defense counsel's argument structure and microlinguistic uses cast the jurors in the role of the classical mythic hero whose efforts to decide the case constitute a quest. Defense counsel's story line is how "[t]he jurors, faithful to their oath, acquitted the defendant although he sorely tempted them to do otherwise by killing the victim in a dastardly fashion." This story of the trial also displaces the defendant's killing of the victim from center stage, subordinating it to the jurors' task. *Id.* at 67.

291. For research correlating microlinguistic events with outcomes in criminal trials, *see* Michael Parkinson, *Verbal Behavior and Courtroom Success*, 30 COMM. EDUC. 22 (1981). Some of Parkinson's specific findings support Amsterdam and Hertz's framework, *e.g.*, that the indicative mood, used to express unqualified assertions of fact, is an indicator of prosecutorial success and defense counsel failure; that defense attorneys are more success-

Advocates in negligence trials, like those in criminal trials, might also try to exploit jurors' capacity to understand the case using different cognitive frames. The rhetorical patterns indicating that the lawyers are soliciting jurors to frame the case one way or the other are likely to differ in civil cases. Most importantly, it is not enough for defense lawyers merely to engender reasonable doubt about the evidence, because the plaintiff still wins if he can prove his case by a preponderance of the evidence. Moreover, defense lawyers must meet that same burden to win a contributory negligence argument, and to that extent should be as interested as the plaintiff's attorney in having jurors passively frame the relevant evidence as objectively real.

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ful when they use abstract rather than concrete language. *Id.* at 30. Parkinson's brief conclusion is also in line with Amsterdam and Hertz's: that the distribution of verbal behaviors makes sense in light of the prosecutor's task—to present facts—and the defense attorney's task, to sow reasonable doubt. *Id.* at 31-32.

For additional, albeit somewhat limited, empirical confirmation of Amsterdam and Hertz's observations in this regard, *see* WALTER, *supra* note 21, at 157 (noting that use of "common sense" was urged by 62% of prosecutors but only 35% of defense attorneys, while 70% of defense attorneys but only 56% of prosecutors "placed onus on jurors").

One of Amsterdam and Hertz's major contributions is to identify the strategic dimension of jurors' different modes of cognitive processing. *Cf.* Linz & Penrod, *supra* note 20, who do not appear to distinguish the strategic uses of triggering active information processing. *E.g.*, "The attorney's task is to facilitate this information processing. In order for jurors to reach the fairest decision possible, both attorneys must assume some responsibility for providing jurors with the 'cognitive skills' necessary to actively evaluate the events of the trial." *Id.* at 18. And:

> The more the attorney can stimulate or motivate the juror to actively process the information at trial, the better the chances that the truth of the case and arguments will be realized. The juror must be "drawn in" as a "cognitively active" participant in the courtroom proceedings. The attorney's goal is to make the juror a more competent information processor.

Id. at 24. Amsterdam and Hertz may diverge from Linz and Penrod's recommendations in other ways as well, and perhaps generally in their treatment of the implicit aspects of argument. *See, e.g., id.* at 26-27 (contending that attorneys should draw explicit conclusions).

By characterizing the different cognitive frames Amsterdam and Hertz identify as "active" and "passive," I do not mean to suggest any necessary relationship to what cognitive psychologists describe as "active information processing." Many psychologists have recognized that jurors, like other people who must process information, may do so actively. *See* Diamond & Casper, *supra* note 9, at 516-17; Linz & Penrod, *supra* note 20, at 17-25. Considerable research, led by the work of Richard Petty and John Cacioppo, has studied the effects of listener or receiver involvement on cognition and persuasion. *See, e.g.,* Richard E. Petty & John T. Cacioppo, *Issue Involvement Can Increase or Decrease Persuasion by Enhancing Message-Relevant Cognitive Responses,* 37 J. PERSONALITY & SOC. PSYCHOL. 1915 (1979) (describing experiments that provide support for view that high involvement leads to greater focus on content of message, and thus a strong message becomes more persuasive and a weak message less persuasive). The relevance of this research to juror cognition is problematic, because it is unclear whether jurors are in a high- or low-involvement situation as those terms are defined in the literature. *Id.* at 1915.

Thus instead of a simple plaintiff-passive/defendant-active pattern (or vice versa), we might expect to see advocates' invitations to active cognitive framing—including the use of the second person and first person plural, especially with active verbs, and rhetorical questions—used for a variety of purposes. Some we have already seen: lawyers for either side may encourage jurors to participate and identify themselves with the client, or with a prototype to which the opposing party is contrasted.

In this section I offer another hypothesis: that plaintiffs' attorneys will lead jurors to conceive of their decision-making role as active, so that the jurors will feel empowered to award defendants' money to the plaintiffs. This cognitive frame, in turn, may shape jurors' attributions of responsibility. Research suggests that accident victims may first believe that they should be compensated, and only then attribute fault to justify that belief.[292] Similarly, jurors may be more inclined to find a defendant at fault the more they feel capable of awarding damages.[293]

(2) Cognitive Framing in Negligence Arguments

The arguments in *Butler* support the above hypothesis. Butler's lawyer more often engages the jurors in active decision-making through the use of the second person and first person plural points of view, active verbs, and rhetorical questions than does Revere's attorney. He uses the second person and first person plural at about twice the rate of Revere's attorney.[294] And when we go beyond this rather crude indicator to examine the sorts of verbs the attorneys use in connection with the second person and first person plural, we find that

292. *See* Lloyd-Bostock, *Common Sense Morality,* supra note 262, at 99-100.

293. There is reason to believe that the *less* jurors feel capable of awarding damages, the more inclined they will be to blame the plaintiff (*see* Miller et al., *supra* note 143, at 312 (noting that simulation heuristic experiments show that ease with which observers can mentally undo victim's fate affects their reactions to victim, and that consequently, observers will compensate more those victims whose fate can be easily undone, but will derogate those same victims more if compensation isn't possible); Mysliwiec, *supra* note 15, at 1036 (reasoning from equity theory that one who observes inequity will attempt to restore "actual" equity if he has power to do so, but if not, he will restore "psychological" equity by blaming victim for the inequity)), and the greater the fault attributed to the plaintiff, the less the fault attributed to the defendant (*see* Thomas & Parpal, *supra* note 265). The hypothesis offered in the text is the converse of this proposition.

294. Considering the arguments in their entirety, Butler's and Revere's attorneys appear to use the second and first person plural at about the same rate (6.25 instances per 25-line transcript page for Butler's attorney versus 6.3 per page for Revere's attorney). However, excluding the crucial analogy of the refrigerator repairman, during which Revere's attorney uses the second person at a rate of 19 per page (13 instances in 17 lines), he uses it at a rate of only 3.2 per page—about half as often as Butler's attorney overall.

Butler's attorney more often casts the jurors as actors.[295] Moreover, while both lawyers conceive of the jurors as equally active and passive when evaluating evidence,[296] a striking difference emerges when the lawyers address the jurors as decision-makers. Butler's attorney addresses them using active verbs that empower them. These jurors "hold [plaintiff's] only chance"; they will struggle in facing the "difficult chore" of deciding, but "wi[ll] make [their] best effort."[297] When Revere's attorney addresses the jurors, he tells them what to do, disempowering them. They "must . . . set aside all feelings of sympathy"; they "must not speculate"; they "must bring in a verdict that is fair, just, and impartial."[298] In all, Butler's lawyer portrays the jurors as active decision-makers about six times as often as does Revere's lawyer.[299]

The evidence from the respective attorneys' uses of rhetorical questions[300] points in the same direction, though perhaps not significantly. Butler's lawyer asks rhetorical questions at a slightly higher rate than does Revere's.[301] But Revere's attorney answers all rhetori-

295. Butler's attorney, 62% of the time (60 out of 95 instances when second or inclusive first person was used with a verb); Revere's attorney, 47% of the time (14 out of 30, and only 27% aside from the refrigerator repairman story).

296. Butler's attorney, 23 active verbs out of 43 instances; Revere's attorney, 5 out of 10. Both counsel also treat the jurors as more active than passive when counsel are telling stories—Butler's attorney, 14 active verbs out of 15 instances; Revere's attorney, 6 out of 9.

297. B. 30.6, 28.6 (*see also* 29.5); 30.22-23.

298. B. 31.7; 31.8-9 (*see also* 34.24); 31.9-10. The anaphora of these remarks in the introduction emphasizes the sense of obligation and command. In the argument on causation, Revere's attorney again tells the jurors: "You cannot . . . speculate" (34.24-25). And in the conclusion, he says: "[A] verdict in [plaintiff's] favor in this case would be a breach of your oaths as jurors to bring in a verdict that is fair, just, and impartial" (36.4-6); "the law that you must follow" (36.8-9). Indeed, the only arguably nonpassive conception of the jurors in this respect is "[a]ll of us certainly are . . . sympathetic" to Butler (36.1), a weak copulative.

299. Butler's attorney portrays the jurors' decision-making as active 68% of the time (15 instances out of 22 references to jurors as decision-makers), while Revere's attorney does this only 11% of the time (1 instance out of 9).

300. It appears generally that rhetorical questions generate more intensive message processing than do statements. Robert E. Burnkrant & Daniel J. Howard, *Effects of the Use of Introductory Rhetorical Questions Versus Statements on Information Processing,* 47 J. PERSONALITY & SOC. PSYCHOL. 1218 (1984) (noting that strong messages become more persuasive in low-involvement situations when introduced with rhetorical questions instead of statements). *But cf.* Richard E. Petty et al., *Effects of Rhetorical Questions on Persuasion: A Cognitive Response Analysis,* 40 J. PERSONALITY & SOC. PSYCHOL. 432, 438-39 (1981) (reporting that in high-involvement situation, use of rhetorical questions to summarize argument disrupts thinking and makes strong messages weaker).

301. Butler's attorney, 0.765 per page (13 in just under 17 pages: B. 22.18-19, 22.19-22, 26.20, 27.16-18, 30.18-21, 37.4-5 (3 questions), 37.11, 37.14, 37.17-20, 37.25-38.1, 38.12-13); Revere's attorney, 0.545 per page (3 in 5½ pages: B. 32.20, 34.10, 32.11).

cal questions he poses. This indicates that he is not using the device to engage the jurors' thought processes. He doesn't want them to think for themselves. Butler's attorney, by contrast, leaves unanswered seven of thirteen rhetorical questions.[302]

In the arguments in *Roe v. Hocon*,[303] similarly, the plaintiff's lawyer more often engages the jurors as active decision-makers. Roe's lawyer uses the second and first person plural slightly more often than does the defendant's lawyer.[304] A slightly larger portion of the total uses describes the jurors' decision-making,[305] and a greater percentage of these uses envisions the jurors as active.[306] Roe's attorney also asks two-and-a-half times as many rhetorical questions.[307] Moreover, the metaphoric images of decision-making emphasize this contrast. Dominant in Roe's lawyer's argument are verbs of movement and activity: jurors "approach" each question by "turning" to the evidence; they "work back" through the evidence of causation.[308] And when Roe's lawyer advises jurors how to award damages to the widow, he imagines them acting: "[Y]ou want to salute this woman . . . and just say, Well done, you," and: "[T]his is your opportunity to say in the only way our law knows" what was lost in the accident.[309] For Hocon's attorney, by contrast, the jurors are mostly passive decision-makers: the law, the facts, the evidence, and the proof are "given" to them, and their decision is "control[led]" by their recollections.[310]

302. And as to two others, he doesn't answer with a declarative, third-person response, but rather with "I don't buy that" (B. 37.20) and "I think . . ." (B. 38.1-2), which sustains the image of a conversation with the jurors. *Cf. supra* notes 289-91 and accompanying text (Amsterdam and Hertz's interpretation of criminal defense counsel's argument as a dialogue with jurors).

303. *See supra* text accompanying notes 161-64 for the facts of this case.

304. Roe's attorney uses the second and inclusive first person at a rate of 11.45 instances per 27-line page (293 instances, or 4.3%, of an estimated 6,753 total words, given an average of 9.77 words per line, 27 lines per page, and 25.6 pages). Hocon's attorney uses the second and inclusive first person at a rate of 9.26 instances per 27-line page (181 instances, or 3.5%, of an estimated 5,170 words (19.6 pages)).

305. Roe's attorney, 55.6% of total uses (163 out of 293); Hocon's attorney, 51.2% (94 out of 181).

306. Roe's attorney, 41.7% active verbs to describe jurors' decision-making (68 out of 163); Hocon's attorney, 30.8% (29 out of 94).

307. Roe's attorney, 1.40 per page (36 in 25.6 pages of 27 lines); Hocon's attorney, 0.56 per page (11 in 19.6 pages).

308. *See, e.g.*, R. 29.9, 31.25-26 ("turning" to evidence); 28.21, 29.1-2 ("going through" the special verdict questionnaire); 34.14-15 ("approaching" a question); 38.12, 42.6 ("moving to" a question); 34.15, .25, 36.14 ("working backwards" through causation question).

309. R. 49.9, 49.21-23; *see also* 45.21 ("stamp your feet" regarding apparently outrageous verdicts).

310. *See, e.g.*, R. 51.19 (evidence is given), 51.26 (law is given), 54.13 (facts are given), 58.6 (proof is given); 60.23, 65.6 (recollections control). To be sure, Hocon's attorney also

The exception to this pattern is *Giulietti,* in which the railroad's lawyer, more so than Giulietti's, actively involves the jury in the decision-making process. The railroad's attorney uses the second person and first person plural almost two-and-a-half times as often as does Giulietti's attorney,[311] and almost four times as often (as a percentage of each lawyer's overall uses) to engage the jurors in their decision-making function.[312] Moreover, the railroad's attorney asks rhetorical questions no less than seventeen times as often as does Giulietti's.[313] Perhaps the evidence of the defendant's negligence was so strong that its attorney, atypically, wanted jurors to conceive of their role as active, so that they might more readily challenge the "passive take" on the case.

III. Conclusion: The Rhetoric and the Law of Torts

I began this Article by observing that jurors' conceptions of negligence may very well diverge from appellate doctrine, at least as communicated to the jurors through instructions, yet by and large appear to do the justice that the doctrine is designed to produce.[314] The analysis of advocates' closing arguments allows us to infer some characteristics of how jurors think about negligence, and to speculate about how that thinking accommodates both the formal law and the tools of ordinary judgment.

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speaks of the jurors' task using verbs of movement: *e.g.,* R. 53.1, 54.25, 59.2 (getting or turning to questions). And both attorneys use the metaphor, ambivalent in this context, of "following" the law or the evidence. *Compare, e.g.,* R. 28.9 (Roe's attorney) *with* R. 51.11, 51.13 (Hocon's attorney). But the excerpts in the text accurately describe the overall pattern.

311. Railroad's counsel, 10.2 instances per 25-line page (179 instances, or 4.3%, of an estimated 5,100 total words, given an average of 9.4 words per line, 25 lines per page, and 17.6 pages); Giulietti's counsel: 4.3 per 25-line page (94 instances, or 1.8%, of an estimated 4,136 words (21.7 pages)).

312. Railroad's counsel, 60 of 179, or 34%; Giulietti's counsel, 8 of 94, or 9%. About the same proportion of each counsel's overall uses describe the jurors' understanding of the evidence (railroad's counsel, 63 of 179, or 35%; Giulietti's counsel, 32 of 94, or 34%). And both equally use the second or first person plural to get the jurors to identify with a prototype of due care which the other party did not meet (railroad's counsel, 38 of 179, or 21%; Giulietti's counsel, 17 of 94, or 18%).

313. Giulietti's counsel uses two rhetorical questions in almost 22 pages of transcript, or 0.09 instances per page; while the railroad's counsel uses 27 rhetorical questions in under 18 pages, or 1.53 per page.

314. *See supra* notes 9-10 and accompanying text.

A. The Common Sense of Negligence Implicit in Lawyers' Rhetoric

The arguments in *Butler* and other accident cases suggest that jurors determine responsibility for accidents by comparing what happened to something else. The comparisons are of two general sorts. According to the advocates' rhetoric, jurors compare the parties and their conduct to prototypes of how reasonable people behave, in order to decide whether the parties fit. Jurors also contrast what happened to hypothetical scenarios in which the accident did not occur, in order to identify some act or omission by one or both of the parties as the cause of the accident. Research shows that changing the counterfactual scenario to which subjects compare the facts, but not changing the facts themselves, changes attributions of causation[315] and responsibility.[316] The prominence of person-situation prototypes in the arguments suggests that they have a similar impact on these attributions.

Two features of this rhetoric are noteworthy. First, to understand how the relevant legal notions of causation and reasonable care apply to the evidence, we must refer not only to what happened, but also to jurors' specific conceptions of what could and should have happened.[317] One might, in theory, attempt to catalogue prototypes of persons and events the way treatises sample appellate statements of the facts constituting reasonable or unreasonable behavior.[318] But the prototypes are innumerable—as various as the popular cultural sources on which jurors can be expected to draw. Second, the use of prototypes, counterfactual scenarios, and cognitive frames tends to merge the ordinarily separate elements of negligence doctrine.[319]

The arguments in *Butler* illustrate these aspects of the common sense of torts. According to Butler's lawyer, Revere is responsible for

315. *See* Wells & Gavanski, *supra* note 143, at 164 (observing that subjects attributed greater causal significance to event if its counterfactual alternative would have resulted in different outcome than if alternative resulted in the same outcome).

316. *See* Macrae, *supra* note 143, at 86-87 (noting that the more available a counterfactual scenario in which accident did not occur, the more compensation subjects awarded victim and the more negligent they judged injurer).

317. *Cf.* Manzo, *supra* note 12, at 649-50, 662 (jurors evaluate parties' and lawyers' conduct by comparing it to normative assertions, "whether [these assertions take the form of] discrete narratives, aspects of folk wisdom, or elements of technical knowledge[ ]," drawn from the jurors' "common knowledge" and their everyday experience).

318. *See supra* note 86 (descriptions of "reasonable person" culled from appellate decisions).

319. This is not, of course, to say that the elements are always entirely distinct in appellate or hornbook law. For instance, the concepts of duty and proximate cause are often blended. *See, e.g.*, KEETON ET AL., *supra* note 1, § 42, at 274-75; *see also infra* note 329 (merger of causation and breach of duty in Uniform Comparative Fault Act).

George Butler's injuries, because if Brockway and other employees had simply helped Butler put the tarpaulin on the load instead of going on a coffee break, Butler would not have been hurt. Brockway's behavior is deviant, because it contrasts with a normal scenario in which people help others if they can do so with little cost or effort. And the deviant act is the cause of the deviant outcome: Butler's fall. Butler, moreover, deserves to be compensated because he's Rocky: Everyman, just doing his job, and now heroically fighting to overcome his injuries. In contrast, according to Revere's lawyer, Butler is responsible for his own, admittedly tragic injuries because Revere's employees had no duty to help him put the tarpaulin on the load. Their behavior was normal and reasonable, not deviant; they acted just as the jurors themselves would have acted in a similar situation. Moreover, there is no evidence that the failure to help caused the accident. The arguments also show Butler's lawyer engaging the jurors as active decision-makers, perhaps so that they will feel empowered to hold the defendant responsible and to compensate Butler despite an apparently daunting lack of proof of duty and causation.

Advocates' tort arguments may suggest larger cultural meanings. For instance, the simulation heuristic and the fundamental attribution error, both of which incline jurors to find someone culpable, may serve a contemporary need to assign blame and thus to assert moral control in an uncertain, socially fragmented world.[320] But jurors may use prototypes to exculpate as well as to inculpate. Thus, the overall direction, if any, of the common sense of negligence is unclear.

B. Cognitive Heuristics and Legal Categories: How Jurors Can Follow the Law

The closing arguments indicate that jurors will reason about accident cases by using both the elements of the formal law and various knowledge structures and inferential heuristics. These two approaches are often thought of as dichotomous or in tension. "A jury cannot be said to have reached a correct verdict unless it understands the relevant law."[321] Yet the legal system tolerates and even encourages jurors to augment (and sometimes, if necessary, to nullify) legal rules by ap-

320. *See* MARY DOUGLAS, RISK AND BLAME 15-16 (1992) (analyzing contemporary language of risk as part of cultural blaming practices).

321. Amiram Elwork & Bruce Sales, *Jury Instructions,* in THE PSYCHOLOGY OF EVIDENCE AND TRIAL PROCEDURE, *supra* note 21, at 281.

plying their own senses of justice.[322] To what extent is jurors' justice actually consistent with the law of negligence? How can it be that jurors who seem not to understand the law as expressed in judges' instructions nevertheless decide cases in ways that strike most judges as correct enough?[323]

The tools of ordinary judgment fit comfortably within negligence law for a number of reasons. First and most generally, the formal law accommodates jurors' uses of many of the cognitive habits examined in this Article, and indeed cannot help but do so. "The tort system . . . purports, both at the level of general principle and at the level of particular definitions of fault and their application, to accord with common sense."[324] Elements of negligence law such as reasonable care and causation provide only very broad guidelines, within which jurors may apply tools of common sense, such as prototypes, not prescribed by the instructions themselves.[325] This is because, in law, rules are inevitably applied to stories; negligence instructions, therefore, must accommodate both the rule-element and narrative-prototypical modes of thinking.[326]

322. *See supra* note 74 (jurors' functions). An additional reason to expect juror judgments to vary from the formal law is that closing arguments and jurors' deliberations are spoken, while the formal law is written. The use of intuitive tools to organize thought in oral culture may very well differ from the ways in which thought is organized in written culture. *See* WALTER J. ONG, ORALITY AND LITERACY (1982) (analyzing cognition in oral and written cultures); Ronald K.L. Collins & David M. Skover, *Paratexts,* 44 STAN. L. REV. 509, 533-36 (1992) (noting effects on legal system of print culture supplanting oral and written culture).

323. *See supra* notes 8-10 and accompanying text.

324. Lloyd-Bostock, *Attributions,* supra note 15, at 263; *cf.* OLIVER WENDELL HOLMES, THE COMMON LAW 36 (Mark deWolfe Howe ed. 1963) ("The first requirement of a sound body of law is, that it should correspond with the actual feelings and demands of the community, whether right or wrong.")

325. For the standard instruction on negligence see *supra* note 86. As for "proximate cause," the standard instruction states:

> An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or damage, and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission.

3 DEVITT ET AL., *supra* note 86, § 80.18, 170. Obviously, these "rules" are quite open-ended, leaving jurors to fill in the blanks. The proximate cause instruction, incidentally, commits the basic error of including in the definition one of the terms to be defined ("cause").

326. *Cf.* BRUNER, ACTUAL MINDS, *supra* note 78, at 11-14 (describing paradigmatic or rule-based and narrative as distinct modes of thinking). For a famous illustration of the tension in appellate opinions between reducing "reasonable care" to a rule and keeping it sensitive to each new story, compare *Baltimore & O.R.R. v. Goodman,* 275 U.S. 66, 70 (1927) (Holmes, J.) (reversing judgment for plaintiff on ground that decedent violated rule

Second, the law itself to some extent merges the categories of rule-element thinking, just as jurors are wont to do. For instance, research indicates that jurors' damage awards may reflect judgments about liability;[327] jurors' assessments of how much the plaintiff's own misconduct contributed to the accident and how much to award for pain and suffering may conflate causation and fault.[328] Yet the law of comparative fault itself merges causation and breach of duty.[329]

Two other reasons help explain the perceived consistency between jurors' judgments and the law. First, in many cases, judges and other legal professionals would themselves use the same knowledge structures and heuristics as would jurors in applying such open-ended rules as those governing reasonable care and causation. By using prototypes to think about reasonable care, for instance, jurors make law the same way that Levi and Llewellyn believed appellate judges should, and do, make common law.[330]

Second, the very secrecy of deliberations may lead judges and others to believe that jurors' understandings of negligence law are largely congruent with their own. With few exceptions, the law toler-

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to "stop, look, and listen" by failing to get out of his vehicle and look before traversing grade crossing) with *Pokora v. Wabash Ry.*, 292 U.S. 98 (1933) (Cardozo, J.) (reversing directed verdict for defendant and remanding on ground that *Goodman* rule was too inflexible and that such decisions should be left to jury discretion rather than commanded by rule).

Another explanation for why rules alone cannot govern the attribution of responsibility for accidents is that moral reasoning necessarily draws on exemplars (of people and the stories of their actions) as well as rules. It is only by these examples of something finer than ourselves, yet not unapproachable or impossibly distant, that we ought to measure ourselves and others. *See* MARTHA C. NUSSBAUM, LOVE'S KNOWLEDGE 164-65 (1990).

327. *See, e.g.*, A.B.A. SPECIAL COMM., *supra* note 9, app. 10, at 25-26 (citing evidence of intrusion of liability issues into juror deliberations on damages); Kalven, *supra* note 3, at 167 (describing different beliefs about liability and how those beliefs affect damage awards).

328. *See* Kalven, *supra* note 3, at 161 (observing that jury has great freedom to make complex value judgments in determining pain and suffering damages); *id.* at 167-68 (describing how jury, when given contributory negligence instruction, may discount damages or compromise the verdict to account for its sense that someone other than defendant was at fault).

329. *See* UNIF. COMPARATIVE FAULT ACT § 2(b), 12 U.L.A. Supp. 50-51 (West 1995): "In determining the percentages of fault, the trier of fact shall consider both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed." Compare the judge's instructions in *Roe v. Hocon*: "In determining the comparative negligence of each party, you should consider the totality of the acts and conduct on each side and the degree to which each contributed to the injury sustained and thus arrive at a fair and just determination of how the award is to be apportioned" (R. 95.18-23).

330. *See supra* notes 64-65 and accompanying text.

ates results that are correct enough,[331] even if jurors actually reached them for the wrong reasons. Judges and other legal professionals who observe the results but not the process may tend to presume that if the result is within the law (or roughly what they themselves would have decided), that the reasoning behind it was also consistent with their own understanding of the law.

On the other hand, some cognitive habits may lead to decisions contrary to negligence doctrine. First, the research of Vicki Smith on prototypes and lay decision-making and that of Reid Hastie and others on the "story model" indicates that jurors will think in terms of prototypes regardless of how they are instructed.[332] It is certainly conceivable that this way of thinking could lead jurors to attribute responsibility for an accident without support by a preponderance of the evidence on fault and causation. *Butler* may be just such a case.

Second, whether a party used reasonable care under the circumstances, for example, should not depend on the kind of person that party is.[333] Yet this is how the fundamental attribution error leads jurors to think. Indeed, by asking jurors to compare a party's conduct to that of the "reasonable person," the standard negligence instruction invites jurors to commit this error, because it directs jurors' attention to the person rather than to the risks posed by the behavior under the circumstances.[334]

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331. *See supra* notes 4, 6 and accompanying text.

332. *See supra* notes 67-73 and accompanying text (prototypes); *supra* notes 76, 79 (story model). *But cf.* Smith, *supra* note 73 and accompanying text (jurors' use of prototypical crime definitions somewhat reduced by corrective instructions that explicitly address features of prototype).

333. *See supra* text following note 197.

334. *See supra* note 192 (comparing party with reasonable person); *supra* note 197 (focusing on reasonable person). To be sure, the attribution of blame may, like other instances of moral reasoning, properly depend on comparisons of the behavior at hand with the behavior of exemplary persons (*see supra* note 326 on the dependence of moral reasoning on exemplary particulars as well as on rules). The law's "reasonable person," however, unlike the examples of moral excellence offered by history and literature, is devoid of particulars. This allows the attorneys to fill in the blanks in ways that direct jurors' attention to traits (of the reasonable person and of the party) rather than to the situation-specific creation of risks, thereby encouraging jurors to commit the fundamental attribution error.

Perhaps the efforts to improve the intelligibility of jury instructions and the manner in which they are communicated, which have yielded some success, could help bring juror thinking closer to doctrine. Phrasing the negligence instruction in terms of the creation of unreasonable risks might address this problem. On the other hand, given jurors' general inability to understand instructions, such changes might not significantly affect jurors' thinking. *See supra* note 9 (jurors' comprehension of instructions).

For a discussion of the proximate cause instruction and judgmental bias, *see* Johnson & Drobny, *Proximity Biases, supra* note 157, at 294 (observing that California's official jury

Third, jurors' use of either the simulation heuristic or the severity effect could lead to decisions that vary from the formal law, although typically the absence of data about relevant comparison cases would make it difficult to say that jurors' attributions of causation or responsibility were flatly wrong.[335]

There is probably no simple generalization that describes the distribution of judgmental tools and legal rules in juror thinking, as reflected in lawyers' arguments. Both plaintiffs' and defendants' lawyers may be expected to invoke the use of judgmental tools that are generally consistent with the law: both may employ prototypes of reasonable behavior and both may lead jurors to use the simulation heuristic to determine causation. Yet we have seen that plaintiffs' and defendants' lawyers may offer systematically divergent frameworks for evaluating the case. Because the evidence is the most important determinant of juror decisions,[336] we may hypothesize that the stronger the evidence of the defendant's negligence, the more the plaintiff's attorney may be expected to argue in rule-element fashion (as in *Giulietti*); the weaker the evidence, the greater the reliance on habits of judgment that may conflict with those elements, such as the fundamental attribution error and the severity effect (as in *Butler*). Defense counsel, by contrast, would generally be expected to lead jurors to structure their thinking in terms of the formal rule, because the defendant should win if the plaintiff fails to establish any one element. The jurors' interpretation of the law of negligence, as reflected in

instruction on proximate cause may bias jurors toward causal and temporal proximity schemas, excluding more complex chains of causation).

335. In cases for which statistical evidence of causation is lacking, it would seem very difficult to rule out almost any attribution to an event preceding the accident as insufficiently "substantial" to meet the legally required standard, because the court would not have before it the data necessary to perform a covariational analysis. The presence of the severity effect can be conclusively established only through a controlled comparison of the actual case with a similar case featuring the same *ex ante* risk of harm but a different outcome, and evidence of such a comparison case is not likely to be available. Moreover, because the severity effect is a matter of degree (the greater the harm, the more responsible the actor), it would be hard to say that an attribution of fault actually based on the severity effect (assuming we could know this) would be incorrect if there were sufficient evidence to support some finding of fault.

336. *See* Visher, *supra* note 14.

closing arguments, is thus a complex mix of facts, prototypes, counterfactuals, and rules, very much dependent on both the evidence and the advocacy in each case.[337]

337. On the validity of such context-specific understandings in cultural anthropology, *see, e.g.*, GEERTZ, *supra* note 21. Lawyering theory studies the contextualized nature of legal judgment. *See generally* Richard K. Sherwin, *Lawyering Theory: An Overview*, 37 N.Y.L. SCH. L. REV. 9, 9-53 (1992).